135-641

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~1002.~~ 664

THE CHEROKEE NATION, APPELLANT,

vs.

THE SOUTHERN KANSAS RAILWAY COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

FILED APRIL 21, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

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THE SOUTHERN KANSAS RAILWAY COMPANY.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, JANUARY 3, 1888.

1 In the United States Circuit Court for the Western District of Arkansas.

THE CHEROKEE NATION *vs.* THE SOUTHERN KANSAS R'W'Y CO.

To the honorable judges of the circuit court of the United States for the western district of Arkansas, sitting as a court of equity:

The bill of complaint of the Cherokee Nation respectfully represents:

1. That your complainant is a sovereign State, recognized as such by the treaty of Hopewell, concluded November 22nd, 1785; of Holston, concluded July 2nd, 1791: of Philadelphia, concluded January 21st, 1795; of Tellico, concluded October 2nd, 1798; of Washington, concluded May 23rd, 1807; of Cherokee Agency, concluded December 26th, 1817; of Washington, concluded March 10th, 1819; of Washington, concluded May 28th, 1828; of Fort Gibson, concluded February 14th, 1833; of New Echota, concluded December 31st, 1835; of Washington, concluded August 17th, 1846; of Washington, concluded July 10th, 1866, made between the Cherokee Nation and the United States, and exercising the powers,
2 jurisdiction, and functions of a sovereign State within the territory ceded to it and defined under thetreaty of 1833 aforesaid.

2. That by virtue of the inherent rights of sovereignty of your complainant, as recognized by its treaties with the United States as aforesaid, the right of eminent domain as well as other rights of sovereignty in the said territory, the country of your complainant, remains exclusively vested in your complainant.

3. That in addition to the cession of the territory hereinbefore set forth to your complainant by the said several treaties between the United States and the Cherokee Nation, for which cessions your compla-nant gave to the United States a full and valuable consideration, the United States, by letters patent under its seal, conveyed to your complainant the aforementioned territory in fee simple.

4. That all of the said territory, over which jurisdiction, the right of sovereignty and, the fee, so ceded and patented as aforesaid to your complainant, still remains under the jurisdiction and sovereignty of your complainant, save and except certain tracts of land lying west of the 96th degree of west longitude and north of the 37th degree of north latitude, which have been conveyed back to the United States by the Cherokee Nation under the terms of the treaty of 1866.

3 5. That on or about the 21st day of October, 1886, The Southern Kansas Railway Company, defendant, a corporation of the State of Kansas, without right and without authority, consent, or license from your complainant, entered the domain and territory of your complainant and commenced the construction of a railway through the territory of your complainant.

6. That in the construction of the said railway the said Southern Kansas Railway Company have commenced cutting down the natural surface of the land, building embankments thereon, and appropriating the stone, earth, and lumber found on the line of said

road in the construction of the said railway, and have graded about ten miles of the said road and threaten and intend to carry on the said damage and destruction of the property of your complainant throughout the whole proposed line of said, road the domain of your complainant, destroying the property of your complainant and depriving your complainant, by reason of the construction of said road, of large revenues arising to it from the rental of its property for grazing purposes, from leases now existing upon the lands
4 proposed to be taken and occupied by the said railway, and causing irreparable loss and damage to your complainant.

7. That the said Southern Kansas Railway Company assume and pretend to construct their said railway through the land and domain of your complainant by virtue of the authority of an act of Congress, approved July 4th, 1884, granting the right of way through the Indian Territory to the said defendant, but your complainant avers that no jurisdiction or authority remained in the United States to grant such right of way through the territory of your complainant, nor did the right of eminent domain over such territory remain in the United States, but that by its treaties and patents aforesaid remained solely in your complainant, The Cherokee Nation.

8. That after the passage of the said act of July 4th, 1884, your complainant, ascertaining that the said grant of the right of way was claimed to be through the domain and territory of your complainant, your complainant, by its national council, by an act passed on the 12th day of December, 1884, solemnly protested against such construction being given to the said act of July 4, 1884, and filed a copy
5 of the said protest with the Secretary of the Interior of the United States, and by an act of the same date instructed its delegates at Washington to resist the claim of right or authority on behalf of any railroad corporation to build or maintain any railway through the territory or domain of your complainant without its consent.

9. That on the 14th day of April, 1886, the national council of your complainant, being advised by the Secretary of the Interior of the United States of the filing of a map in the Interior Department by the defendant, pretending to locate its line of railway through the lands and territory of your complainant, by an act of that date, further protested against the locating of the said road upon or of the appropriating of the lands and territory of your complainant without its consent, and further dissenting from and declining to receive as adequate compensation the sum fixed in said act — July 4, 1884, as compensation for the right of way through the Indian Territory.

10. That, notwithstanding the several protests and dissent of your complainant, the said defendant, in still further pursua-ce of
6 its intention to take and appropriate the lands of your complainant, and to build and maintain, without its license and without its consent, a railway through its domain and territory, and still further claiming to act under color of the act of July 4, 1884, aforesaid, procured to be appointed by the President of the United States certain referees or commissioners, to wit, John M. Galloway,

James Brodie, and W. H. Dyer, who have wrongfully undertaken to appraise and to value the rights of your complainant in and to the land and territory embraced within the line of location filed by the defendant in the Department of the Interior aforesaid, and have pretended to award to your complainant as compensation therefor the sum of $3,301.50 for the lands embraced in the main line and $4,051.44 for the land embraced in the branch line of the said proposed Southern Kansas Railway Company.

11. That on the 29th day of October, 1886, the acting Commissioner of Indian Affairs, by a communication of that date, informed your complainant, through its principal chief, of the said pretended finding and award of the said pretended referees.

7 12. That thereupon your complainant, by its national council, on the 17th day of December, 1886, by an act of that date, further protested against the said assumed grant of the right of way, and dissented from the said pretended award as entirely inadequate compensation; that on the 21st day of January, A. D., 1887, your complainant, saving and reserving to itself all objection, protest, and dissent, as hereinbefore set forth, and in no manner conceding the right of the said defendant, without its consent, to appropriate the lands, rights of way, easements, or other property of your complainant, or the authority of the United States to grant the same or authorize in any — the taking or appropriation thereof, appealed to this honorable court from the award of the referees aforesaid and from all proceedings had and taken under said act, and requested the Secretary of the Interior to transmit a transcript of the said award and of all proceedings had under said act of July 4, 1884, to this honorable court.

8 13. That, even though the said referees had been authorized to make the award referred to, the sum by them awarded is entirely insufficient and inadequate compensation for the said right of way; that the same is reasonably worth the sum of $500.00 per mile, and your complainant, protesting against the said award and insisting that the United States have no power to grant a right of way through the territory of your complainant without its consent, and protesting and insisting that the said referees had no lawful authority to make an award for the lands so intended to be taken from your complainant or its domain, and that even on payment of the compensation so awarded the said corporation could acquire no right to build its road through the territory of your complainant without its consent, still insists that the compensation so proposed to be awarded and paid is inadequate, insufficient for the land proposed to be taken, and prays that this complaint may be taken and treated as an original complaint and petition in appeal from the action of the said referees, as provided by section 3 of the act of July 4, 1884, aforesaid.

9 14. Your complainant avers that by reason of the premises aforesaid the referees aforesaid had no authority to condemn any of the land or territory of your complainant or to make any award therefor, and that no right accrued to the said Southern Kansas Railway Company to enter upon or build said proposed rail-

way through the territory of your complainant; yet, nevertheless, and notwithstanding the protests of your complainant, the said defendant is proceeding, by virtue of said pretending awards and under color of the said act of July 4, 1884, to build its said road through the territory of your complainant and to operate the same against the will and consent of your complainant, in violation of its rights and to the great detriment and irreparable damage of your complainant, and will continue to do so unless restrained by this honorable court; that the value of the land so taken and destroyed by the said defendant will amount to more than one hundred thousand dollars.

15. That by section 8 of the act of July 4, 1884, aforesaid, jurisdiction of all controversies between the said defendant and your complainant is vested in this honorable court, and that all proceedings heretofore had have been returned into this court by the Honorable Secretary of the Interior.

Prayers.

To the end, therefore, that your complainant may obtain relief in the premises in this honorable court, where alone adequate relief can be afforded, prays—

1st. That the said Southern Kansas Railway Company may be made defendant to this bill and compelled to answer each and every allegation thereof as if it were directly and particularly interrogated thereto.

2nd. That the said pretended award of the said referees may be vacated and set aside, and that the defendant be decreed to take nothing thereunder.

3rd. That the defendant be restrained and perpetually enjoined from locating or attempting to locate, construct, equip, operate, use, or maintain a railway, telegraph, or telephone line through the lands, domain, or territory of your complainant, and that pending this suit the defendant be restrained as aforesaid *pendente lite.*

4th. That in the event that this honorable court should decline to grant the injunction herein prayed, that the complainant may be awarded full, just, and adequate compensation for the lands so proposed to be taken and the rights, easements, and franchises so proposed to be granted to the said defendant.

5th. And for such other and further relief as the nature of the case may require, may it please this honorable court to grant to your complainant the writ of subpœna against the said Southern Kansas Railway Company, commanding it to appear on some day certain and answer the exigencies of the bill, and abide by and perform such order and decree as this honorable court may pass in the premises.

And as in duty bound your complainant will ever pray.

(Signed) THE CHEROKEE NATION,
By JNO. C. FAY, *Its Attorney.*

(Signed) McDONALD, BRIGHT & FAY,
JNO. C. FAY,
Sol's for Cherokee Nation.

12 UNITED STATES OF AMERICA, } ss:
Western District of Arkansas, }

I, John C. Fay, being duly sworn, on oath depose and say that I am the attorney of the Cherokee Nation; that I have heard read the foregoing bill of complaint and petition of the Cherokee Nation, and that the matters and things therein set forth are true to the best of my knowledge and belief.

(Signed) JNO. C. FAY.

Subscribed and sworn to before me this 26th day of January, 1887.

(Signed) STEPHEN WHEELER,
Clerk U. S. Dist. C't, West Dist. Ark.

(Upon the back of said bill appears the following endorsement, to wit:)

In U. S. circuit court for west. dist. Ark. No. —. Equity. The Cherokee Nation, comp., *vs.* The Southern Kansas Railway Co., def'd'ts. Original bill & petition. Filed Jan'y 26, 1887. (Signed) Stephen Wheeler, clerk. McDonald, Bright & Fay, 1419 F St. N.W., Washington, D. C.

13 SOUTHERN KANSAS RAILWAY COMPANY,
OFFICE OF THE ASSISTANT SECRETARY,
BOSTON, *November 10th*, 1884.

To the Honorable Commissioner of the General Land Office, Department of the Interior, Washington, D. C.

SIR: I hereby notify you that at a meeting of the directors of the Southern Kansas Railway Company, held at Boston on the 8th day of November, 1884, the act of Congress, approved July 4th, 1884, entitled "An act to grant the right of way through the Indian Territory to the Southern Kansas Railway Company, and for other purposes," was accepted by the said company, and I hereby certify that the following is a true copy of the resolution of acceptance passed at the said meeting, to wit:

"Resolved, That this company hereby accepts the act of Congress, approved July 4th, 1884, entitled 'An act to grant the right of way through the Indian Territory to the Southern Kansas Railway Company, and for other purposes.'"

"The assistant secretary of the company is hereby authorized and directed to send a certified copy of this resolution to the Land Department at Washington and the proper authorities of the Indian Territory."

14 Witness my hand and the corporate seal of the said company on this 10th day of November, one thousand eight hundred and eighty-four.

[SEAL.] GEO. L. GOODWIN,
Assistant Secretary.

Council Bill.

Whereas, at the last session of the Congress of the United States, the said Congress did bestow upon two railway corporations named, respectively, the "Gulf, Colorado and Santa Fé and Southern Kansas Railway Company a portion of our common domain and the right to build their respective roads and erect on our lands certain buildings and improvements without securing the assent of the national council or making an agreement therewith as to the disposition of our property; *and* therefore

Be it enacted by the national council, That, believing our common property cannot be taken or given to any private corporation of persons of any State of the United States, and that in this view of the question we are fully sustained by decisions of the courts having reference to, in principle, like matters, and believing that the United States cannot sustain legitimately such contracts for such purposes or in such a manner, we do by this act file our solemn protest against any and all such encroachments on our rights of property.

Be it further enacted, That this act is and shall be part and parcel of the instructions to the delegation.

S. H. BURGE,
Pres't Senate.
E. C. BOUDINOT, JR.,
Cl'k Senate.

Concurred in by council Dec. 12, 1884.

BIRD JONES.
W. S. CORDERAY,
Cl'k Council.

Approved Dec. 12, 1884.

D. W. BUSHYHEAD,
Pl Chief.

Whereas the Congress of the United States, on July 4th, 1884, passed an act entitled "An act to grant the right of way through the Indian Territory to the Southern Kansas Railway Company," thus purporting to give, grant, and convey of the lands of the Cherokee Nation held by it as a body polotic, by title in fee simple from the United States to a private corporation or company of the State of Kansas, certain portions of our territory without having the consent of the Cherokee Nation; and

Whereas by all the treaties of Cherokee Nation with the United States the Cherokee Nation is recognized to have the right to govern the persons and property of its own people, and especially by the 5th article of the treaty of 1835 it is provided that the United States shall "secure to the Cherokee Nation the right of their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such person as have associated themselves with them;' and

Whereas the United States asked the Cherokee Nation when the treaty of 1866 was made that they grant certain rights of way, and by the eleventh article of said treaty said nation granted the right of way to two railways through the lands of the Cherokee Nation, together with other privileges thereto belonging, and has in no former instance attempted to take its property without its consent; and

Whereas the United States authorities have not asked the Cherokee Nation to grant such additional rights, and the Cherokee Nation has not granted it or consented to such disposition of its property for the benefit of a corporation; and

Whereas the said Southern Kansas Railway Company have presented in the Interior Department of the United States, on the
17 18th of December, A. D. 1885, a plat or map of twenty-five miles of the main branch, claiming under such act the right to build said road, which plat was accepted, subject to this right of the Indians, on the 14th day of January, 1886, and said company also filed a plat of the branch line of twenty-five miles in addition on the 12th day of March, 1886, and thus proposed under the terms of the before-mentioned act of Congress to take possession of our property according to its terms; and

Whereas the delegation of the Cherokee Nation, duly authorized, to wit, L. B. Bell and J. G. Schrimsher, delegates, and Wm. A. Phillips, special agent and counsel, did file in the office of the Secretary of the Interior, on the 8th day of July, 1884, the protest of the Cherokee Nation against any step in the direction of recognizing the right of said railway company to take possession of such property of the Cherokee Nation or build such road, and, further, against receiving the sum of fifty dollars per mile for a franchise worth more than ten times that amount, and notifying the Secretary not to receive any such sum on behalf of the Cherokee Nation; and

Whereas the said sum of fifty dollars per mile is altogether inadequate as a price for such a privilege; that the building of
18 a railroad interferes with and causes great damage to grazing and stock interests, for which our lands are largely valuable, and that the privilege is worth not less than five hundred dollars per mile, and that such sum would not fully compensate for the damage done to the Cherokee Nation; and

Whereas said act of Congress, in all its parts which proposes to give the property of the Cherokee Nation or any part thereof, without a judicial determination, to any person or company, is not only in violation of treaties, but of all law and equity, as is the taking of any portion of our land without the grant or consent of the legislative council of the Cherokee Nation: Now, therefore,

Be it enacted by the national council, That the Cherokee Nation hereby dissents from the propositions or the right to dispose of its property under the terms of an act entitled "An act to grant the right of way through the Indian Territory to the Southern Kansas Railway Company, and for other purposes," approved July 4th, 1884, and also dissents from the allowance of fifty dollars per mile as a payment for the right of way of the said road under said act,

and further protests and dissents from any action by said
19 company or any other person or persons to take possession of or use any lands or property of the Cherokee Nation without its consent lawfully obtained or in any other manner so to take or use the property of the Cherokee Nation.

SEC. 2. Be it further enacted, That the principle chief shall certify this action to the Secretary of the Interior, and place this our dissent and protest on file in the proper departments of the Government of the United States, and give notice thereof to all whom it may concern.

April 13, 1886.

L. B. BELL,
President of the Senate.
R. T. HANKS,
Clerk of the Senate.

Concurred in by the house on this 14th day of April, 1886.

ALEX. HAWK,
Speaker of Council.
C. C. LIPE, *Clerk Council.*

Approved April 14th, 1886.

D. W. BUSHYHEAD,
Principal Chief C. N.

Report of Commissioners.

The Southern Kansas Railway Company; right of way through the Indian Territory.

TOPEKA, KANSAS, *September* 25, 1886.

To the President:

20 In the matter of the right of way of the Southern Kansas railway through the Indian Territory under an act of Congress entitled "An act to grant the right of way through the Indian Territory to the Southern Kansas Railway Company, and for other purposes, approved July 4th, 1884," a copy of which is hereto attached (marked Exhibit "A"), and made a part hereof, the commissioners appointed to act under the third and fifth sections of said act of Congress make this their report of their doings thus far:

The commissioners met at the city of Topeka, Kansas, August 26th, 1886.

Having first duly qualified according to law, their oaths of office being hereto attached (marked Exhibit 1, 2, and 3), and made a part of this report, organized and selected John M. Galloway to act as chairman, and proceeded at once to the Indian Territory in the discharge of their duties.

Cherokee lands.

The commissioners having been duly notified that the general council of the Cherokee Nation, through whose lands in the Indian

Territory a portion of said Southern Kansas railway (main line and branch) is located, had dissented from the allowances provided for in the fifth section of said act of Congress, a certified copy
21 of which dissent is hereto attached (marked Exhibit "B") and made a part of this report, proceeded to inspect said line of railway, as located, as it traverses the lands of said Cherokee Nation with its main line from a point "beginning on the northern line of said Territory, where an extension of the Southern Kansas railway from Winfield in a southerly direction would strike said line, running thence south in the direction of Dennison, in the State of Texas," and proceeded to inspect said line of railway, as located, as it traverses the lands of the said Cherokee Nation with its branch from a point on the northern line of said Territory, near where Medicine Lodge creek crosses the same in a southwesterly direction to a point on the waters of Wolf creek, near where said creek crosses the west line of the Territory.

Upon actual view of the lands belonging to said Cherokee Nation, which are to be taken and appropriated by said railway company for the right of way, station grounds, construction, and maintenance under said act of Congress for said main line and branch, we find:

Main-line findings.

First. That the main line of said railway traverses the lands of the Cherokee Nation as located from where it enters the same at a point on the north line of the Indian Territory, about four
22 and one-half ($4\frac{1}{2}$) miles south of Arkansas City, Kansas, to the south boundary of what is known as the Cherokee Outlet, a distance of 35.5 miles.

Second. That the Cherokee Nation is entitled to receive as adequate compensation for the lands so to be taken and appropriated and damages done by the construction of said railway for the said 35.5 miles of said main line the sum of ninety-three dollars ($93) for each mile, making a total of three thousand three hundred and one and fifty one-hundredths dollars ($3,301.50).

Main-line award.

In consideration of the premises we do hereby award to the Cherokee Nation as full allowance for compensation in this matter the said sum of three thousand three hundred and one and fifty one-hundredths dollars ($3,301.50), and order and adjudge that the same be paid to said Cherokee Nation by the Southern Kansas Railway Company at the time and in the manner and form as hereinafter recited.

Branch-line findings.

We further find—

First. That the branch line traverses the lands of the Cherokee Nation, as located, from where it enters the same at a point on the

north line of the Indian Territory (about one mile south of
23 New Kiowa, Barber county, Kansas) to the south line of what is known as the Cherokee Outlet, a distance of 112.54 miles.

Second. That the Cherokee Nation is entitled to receive as adequate compensation for the lands so to be taken and appropriated and damages done by the construction of said railway for the 112.54 miles of said branch line the sum of thirty-six dollars ($36) for each mile, making a total of four thousand and fifty-one and fourty-four hundredth- dollars ($4,051.44).

Branch-line award.

In consideration of the premises, we do hereby award to the Cherokee Nation, as full allowance for compensation in this matter, the said sum of four thousand and fifty-one and fourty-four hundredth-dollars ($4,051.44), and order and adjudge that the same be paid to the said Cherokee Nation by the said Southern Kansas Railway Company at the time and in the manner and form hereinafter recited.

Notice and filing of report and payment of award.

It is ordered that notice of the making of the awards herein shall be given to the nations and tribes interested therein and affected thereby by the chairman of this commission filing forthwith, in the office of the principle chief of each of the nations or tribes through whose lands said railway is located, as herein re-
24 ported, a copy of this report, except the oaths of office, exhibits, and that part of report in relation to individual occupancy, certified to by the chairman as a true and correct copy.

Thereupon the chairman shall indorse upon the report the time and manner of his making such service of notice, and shall then file this report in the office of the Secretary of the Interior at Washington, D. C., and at the same time request the Secretary of the Interior to notify the Southern Kansas Railway Company of the fact of said report being so filed.

It is further ordered that within ten days after the said Southern Kansas Railway Company has received notice from the Secretary of the Interior that this report has been filed they shall deposit or cause to be deposited with the Secretary of the Interior the sum of eleven thousand three hundred and sixty and two-hundredths dollars ($11,360.02), that being the sum total of the awards herein made, for such disposition under the law and order of the Secretary of the Interior as may be just and proper.

Cost bill.

James Brodie, 2,191 miles at 5 cents per mile	$109 55
James Brodie, 37 days at $4 per day	148 00
W. H. Dyer, 1831, miles at 5 cents per mile	91 55
W. H. Dyer, 37 days at $4 per day	148 00
John M. Galloway, 1,310 miles at 5 cents per mile	65 50
John M. Galloway, 32 days at $4 per day	128 00

25 The foregoing bill of costs was paid by the Southern Kansas Railway Company.
Respectfully submitted,

W. H. DYER.
JNO. M. GALLOWAY.
JAMES BRODIE.

Filed in the Department of the Interior October 21, 1886.

26 Refer in reply to the following: L 28,303, 1886.

C. A. M.
E. S. W.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, *October 29th*, 1886.

Hon. D. W. Bushyhead, princip*le* chief Cherokee Nation, Tahlequah, Ind. Ter.

SIR: Messrs. John W. Galloway, James Brodie, and Wm. H. Dyer, the referees appointed by the President under the act of Congress of July 4th, 1884, to appraise the value of the right of way and determine the amount of compensation to be paid for individual damages occasioned by reason of the construction of the Southern Kansas railway in the Indian Territory, have filed in the office of the Secretary of the Interior their report of appraisement and of the several awards made thereunder to the Cherokee Nation, the Ponca tribe of Indians, and the Otoe and Missouri tribe of Indians, respectively, aggregating in amount the sum of eleven thousand three hundred and sixty and two one-hundredths dollars ($11,360.02).

With respect to the Cherokee Nation the report finds as follows:

"Upon actual view — the lands belonging to said Cherokee Nation which are to be taken and appropriated by said railway company for the right of way, station grounds, construction, and main-
27 tenance under said act of Congress for said main line and branch, we find—

Main-line findings.

"First. That the main line of said railway traverses the lands of the Cherokee Nation, as located, from where it enters the same at a point on the north line of the Indian Territory, about four and one-half (4½) miles south of Arkansas City, Kansas, to the south boundary of what is known as the Cherokee Outlet, a distance of 35.5 miles.

"Second. That the Cherokee Nation is entitled to receive as adequate compensation for the lands so to be taken and appropriated and damages done by the construction of said railway for the said 35.5 miles of said main line the sum of ninety-three dollars ($93) for each mile, making a total of three thousand three hundred and one and fifty one-hundredths dollars ($3,301.50)."

"Main-line awards.

"In consideration of the premises, we do hereby award to the Cherokee Nation as full allowance for compensation in this matter the said sum of three thousand three hundred and one and fifty one-hundredths dollars ($3,301.50), and order and adjudge the the same be paid to said Cherokee Nation by the Southern Kansas Railway Company at the time and in the manner and form as hereinafter recited."

28 "Branch-line findings.

"We further find, first, that the branch line traverses the lands of the Cherokee Nation, as located, from where it enters the same at a point on the north line of the Indian Territory (about one mile south of New Kiowa, Barber county, Kansas) to the south line of what is known as the Cherokee Outlet, a distance of 112.54 miles.

"Second. That the Cherokee Nation is entitled to receive as adequate compensation for the lands so to be taken and appropriated and damages done by the construction of said railway for the 112.54 miles of said branch line the sum of thirty-six dollars ($36) for each mile, making a total of four thousand and fifty-one and forty-four hundredths dollars ($4,051.44)."

"Branch-line award.

"In consideration of the premises, we do hereby award to the Cherokee Nation as full allowance for compensation in this matter the said sum of four thousand and fifty-one and fourty-four hundredths dollars ($4,051.44), and order and adjudge that the same be paid the said Cherokee Nation by the said Southern Kansas Railway Company at the time and in the manner and form hereinafter recited."

29 The total amount so awarded to the Cherokee Nation as compensation for right of way for the main and branch lines of the Southern Kansas railway through its lands would thus appear to be seven thousand three hundred and fifty-two dollars and ninety-four cents ($7,352.94).

Appended to said report is a certificate, signed by Mr. Galloway, chairman of the board of appraisers, of the filing of a copy of the said report in the office of the principle chief of the Cherokee Nation on the 9th October instant.

In conformity with the order made in said report, the Southern Kansas Railway Company has filed in the Department a bank draft on New York for $11,360.02, the aggregate amount of the awards, for such disposition under the law and order of the Secretary of the Interior as may be just and proper.

The fifth section of the act in question provides that in case of dissent by the general council of either of the nations or tribes through whose lands said railway may be located from the allowances provided for in the same section, "then all compensation to

be paid to such dissenting nation or tribe, under the provisions of said act, shall be determined as provided in section three
30 for the determination of the compensation to be paid to the individual occupant of lands with the right of appeal to the courts upon the same terms, conditions, and requirements as therein provided."

"Provided further, That the amount awarded or adjudged to be paid by said railway company for said dissenting nation or tribe shall be in lieu of the compensation that said nation or tribe would be entitled to receive under the provisions of this section."

The third section of the act to which reference is made provides: * * * "Either party being dissatisfied with the findings of the referees shall have the right, within ninety days after the making of the award and notice of the same, to appeal by original petition to the courts, where the case shall be tried *de novo*."

"When proceedings have been commenced in court the railway company shall pay double the amount of the award into court to abide the judgment thereof, and then have the right to enter upon the property sought to be condemned and proceed with the construction of the railroad." * * *

Section eight of the act provides that the United States cir-
31 cuit and district courts for the northern district of Texas, the western district of Arkansas, and the district of Kansas, and such other courts as may be authorized by Congress shall have, without reference to the amount in controversy, concurrent jurisdiction without distinction as to citizenship for the purposes of the act.

In accordance with the acting Secretary's instructions, you are now notified, on behalf of the Cherokee Nation, of the action of the board of appraisers and of that of the Southern Kansas Railway Company in depositing the amount awarded with the Department.

You will please inform this office in due course of the action taken by the national council thereon.

Very respectfully, A. B. UPSHAW,
Acting Commissioner.

H. E. H.

An act to authorize the principle chief to bring suit against the Southern Kansas Railway Company, pursuant to the provisions of an act of Congress approved July 4th, 1884, and entitled "An act to grant the right of way through the Indian Territory
32 to the Southern Kansas Railway Company, and for other purposes," *and for other purposes.*

SEC. 1. Be it enacted by the national council, That the national council of the Cherokee Nation, being one of the nations or tribes through whose lands the main line and the branch line of the railroad of the Southern Kansas Railway Company is located, in pursuance of an act of Congress approved July 4th, 1884, and entitled "An act to grant the right of way through the Indian Territory to the Southern Kansas Railway Company, and for other purposes," hereby dissents from the allowances provided for in the fifth section

of said act, to wit, "the sum of fifty dollars in addition to compensation provided for in said act for property taken and damages done by the construction of said railway for each mile of railway that said railway company may construct in said Territory, said payments to be made in instalments of five hundred dollars as each ten miles of road is graded;" and, to wit, the sum of fifteen dollars per annum to be paid by said railway company to the Secretary of the Interior for each mile of railway it shall construct in said
33 Territory, so long as said Territory is owned and *and* occupied by the Indians.

SECTION 2. Be it further enacted, That the national council of the Cherokee Nation hereby dissents from and rejects as unjust, inadequate, and without the authority of law the award made by the honorable commissioners, John M. Galloway, James Brodie, and W. H. Dyer, appointed by the President of the United States to appraise the value and assess the damages of the right of way granted by said act of Congress to said railway company, said award being under date September 25th, 1886, and in the words and figures following, to wit:

Main-line award.

"In consideration of the premises, we do hereby award to the Cherokee Nation as full allowance for compensation in this matter the said sum of three thousand three hundred and one and fifty one-hundredths dollars ($3,301.50), and order and adjudge that the same be paid to said Cherokee Nation by the Southern Kansas Railway Company at the time and in the manner and form hereinafter recited."

Branch-line award.

In consideration of the premises we do hereby award to the Cherokee Nation as full allowance for compensation in this matter
34 the said sum of four thousand and fifty-one and fourty-four hundredths dollars ($4,051.44), and order and adjudge that the same be paid to the said Cherokee Nation by the said Southern Kansas Railway Company at the time and in the manner and form hereinafter recited.

SEC. 3. Be it further enacted, That the Cherokee Nation does not concede to the United States the rightful power, through its constituted authorities, to authorize any private individual or corporation to enter upon, appropriate, and use any lands belonging to said nation without first obtaining the consent of the constituted authorities of said nation, and hereby protests against the action of said Southern Kansas Railway Company in entering upon and appropriating the lands of the Cherokee Nation as an arbitrary and unjust violation of the guaranteed rights of said nation.

SEC. 4. Be it further enacted, That the principle chief be, and he is hereby, authorized and empowered to proceed, in pursuance of the provisions of the third and the eighth sections of said act of Congress, and bring suit in the circuit court of the United States in and for the western district of Arkansas against said Southern Kan-

sas Railway Company, the object of said suit being to
35 vindicate the absolute title of the Cherokee Nation to all lands within her borders, and to obtain redress from said company for such damages as may have been sustained by said nation by means of the location and construction of said railroad: Provided, That nothing herein shall be so construed as an acknowledgement by the Cherokee Nation of the right of the United States to appropriate the lands of the Cherokee Nation for the benefit of private corporations without its consent.

SEC. 5. Be it further enacted, That the principle chief be, and he is hereby, further authorized and empowered to employ suitable counsel for the bringing and management of said suit on part of Cherokee Nation.

SEC. 6. Be it further enacted, That for the purpose of defraying the expenses of the suit provided for in the fourth section of this act and paying the attorney or attorneys that may be employed in pursuance of the provisions of the last preceding section there is hereby appropriated, out of moneys of the general fund not otherwise appropriated, the sum of two thousand and five hundred dollars, and the principle chief is hereby authorized to draw preferred
36 warrants upon the same from time — as the suit progresses in favor of said attorney or attorneys entitled to the same for their services.

SEC. 7. Be it further enacted, That the additional sum of two thousand and five hundred dollars, appropriated out of any moneys belonging to the general fund, not otherwise appropriated and placed subject to the order of the principle chief on preferred warrants, to be used in like manner, in case of an appeal, in the prosicution of said suit before the Supreme Court of the United States.

SEC. 8. Be it further enacted, That the principle chief be, and he is hereby, authorized and required to certify the provisions of this act to the Secretary of the Interior in pursuance of the provisions of the fifth section of said act of Congress.

December 15th, 1886.

L. B. BELL,
Pres't of the Senate.
R. F. HANKS,
Clerk of the Senate.

Concurred in by the house this December 16th, 1886.

ALEX. HAWK,
Speaker Council.
R. B. CHOATE,
Clerk Council.

Approved December 11th, 1886.

D. W. BUSHYHEAD,
P'l Chief.

37 To the President of the United States:

The Cherokee Nation and D. W. Bushyhead, principle chief of the Cherokee Nation, on their behalf, reserving to said nation all

rights and claims in and to the common property thereof as absolute owner of the same, and expressly denying the right and authority of the United States to grant to any person or corporations any easement, right of way, or property right whatever in, to, and upon their said common property, as specially set forth in their protest of December 12, 1884, evidenced by a copy of the proceedings of the national council of the said nation of that date, duly certified and filed in the office of the Interior Department of the United States, as also their protest of April 14, 1886, evidenced by a copy of the proceedings of the national council of said nation of that date, duly certified and filed with the Interior Department, and also their protest of December 17, 1886, as evidenced by an act of the national council of said nation of that date, a duly certified copy of which is filed in the Department of the Interior, do now here appeal to the circuit court of the United States of the western district of Arkansas from the award and judgment of Messrs. John W. Galloway, James Brodie, and Wm. H. Dyer, referees ap-
38 pointed by the President under the act of Congress of July 4, 1884, to appraise the value of the right of way and determine the amount of compensation to be paid, etc., so far as the same is in favor of the Southern Kansas Railway Company and relates to the common property of the said appellant, the Cherokee Nation aforesaid, including the rights embraced in their protests aforesaid, which said award was filed in the office of the Secretary of the Interior, and notice thereof given, October 29, 1886, to D. W. Bushyhead, principle chief of the Cherokee Nation, by A. B. Upshaw, acting Commissioner of Indian Affairs, against which said award a protest, evidenced by a certified copy of the proceedings of the national council of said nation, approved December 17, 1886, was duly filed in the office of the Secretary of the Interior the third day of January, 1887; and they pray that a transcript of all the proceedings relating to said award and under the act aforesaid, together with this their appeal, be certified to the circuit court of the United States for the western district of Arkansas.

THE CHEROKEE NATION,
By McDONALD, BRIGHT AND FAY,
Its Attorneys.

39 D. W. BUSHYHEAD,
Principle Chief Cherokee Nation,
By McDONALD, BRIGHT AND FAY,
His Attorneys.

DEPARTMENT OF THE INTERIOR.

The Cherokee Nation and D. W. Bushyhead, the chief of the Cherokee Nation, having appealed to the circuit court of the United States for the western district of Arkansas *for* the award of John W. Galloway, James Brodie, and William H. Dyer, referees appointed under the act of July 4, 1884, and from all proceedings under said act, I, L. Q. C. Lamar, Secretary of the Interior of the United States, do hereby certify to said court that the foregoing is a transcript of

all said proceedings remaining on file in the Department of the Interior, so far as they relate to the Cherokee lands.

In witness I have hereunto set my hand and affixed the seal of the Department of the Interior this twenty-second day of January, A. D. 1887.

[SEAL.] L. Q. C. LAMAR, *Secretary.*

40 Endorsed as follows: In the U. S. district court for the western district of Arkansas. The Cherokee Nation *vs.* The Southern Kansas Railway Company. Transcript of proceedings in the Interior Department under act July 4th, 1884. Filed Jan. 26, 1887. Stephen Wheeler, clerk.

41 UNITED STATES OF AMERICA,
Western District of Arkansas:

The President of the United States of America to The Southern Kansas Railway Company, Greeting:

We command and strictly enjoin upon you and each of you that, laying all other matters aside and notwithstanding any excuse, you and each of you be and personally appear before the judge of our district court of the United States in and for the western district of Arkansas on the first Monday in May, A. D. 1887, it being the 2nd day of that month, wheresoever the said court shall then be, and there to answer a bill of complaint exhibited against you in our said court by The Cherokee Nation, and to do further and receive what our said court shall have considered in that behalf, and this you are not to omit under penalty of what the law directs.

In witness whereof Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, has caused the seal of said district court to be hereto affixed this 26th day of January, A. D. 1887.

[SEAL.] (Signed) STEPHEN WHEELER,
Clerk U. S. Dist. Court, Western District of Arkansas.

N. B.—The defendants are required to enter their appearance in the above cause in the clerk's office of this court, in the city of Fort Smith, Sebastian county, Arkansas, on or before the first Monday in March, A. D. 1887, or the said bill will be taken *pro confesso* against the said railway Co.

Dated at Fort Smith this 26 day of January, A. D. 1887.

[SEAL.] (Signed) STEPHEN WHEELER,
Clerk U. S. Dist. Court, Western District of Arkansas.

42 [Endorsed:] No. 34. Cherokee Nation *vs.* Southern Kan. R'y Co. Subpœna in chancery. Issued Jan'y 26th, 1887. Returnable May Term, 1887. Filed Feb'y 18th, 1887. (Signed) S. Wheeler, clerk.

FORT SMITH, ARK., *Feb'y 18th*, 1887.

This summons returned not served.

(Signed) JOHN CARROLL,
U. S. Marshal, West. Dist. Ark.,
By J. C. PETTIGREW, *Deputy*.

43 CHEROKEE NATION
vs.
SOUTHERN KANSAS RAILWAY CO. } In Equity. No. 34.

AT RULES, FRIDAY, *Feb'y 18th*, 1887.

On this day comes the marshal and returns subpœna "not served." It is thereupon ordered that an *alias* subpœna be issued requiring defendant to answer on or before first Monday in April.

THE CHEROKEE NATION
vs.
THE SOUTHERN KANSAS RAILWAY COMPANY. } In Equity. No. 34.

MONDAY, *March 7th*, 1887.

Comes the defendant, by U. M. and G. B. Rose, its solicitors, and enters its appearance herein, and leave is given it to plead, answer, or demur by the next rule day.

CHEROKEE NATION
vs.
SOUTHERN KANSAS R'Y CO. } No. 34.

Compl't in equity.

TUESDAY, *March 8th*, 1887.

On this day come- the defendant, by *her* att'y, and offer-
44 $14,705.98, being double the amount of the award of the commissioners to assess damages for right of way of said defendant's railroad through said plaintiff's territory, in the registry of court.

THE CHEROKEE NATION
vs.
THE SOUTHERN KANSAS RAILWAY CO. } No. 34.

TUESDAY, *March 16th*, 1887.

On this day comes the defendant, by U. M. & G. B. Rose, and files demurrer to bill.

45 UNITED STATES OF AMERICA,
Western District of Arkansas:

The President of the United States of America to The Southern Kansas Railway Company, Greeting:

We command and strictly enjoin upon you and each of you that

laying all other matters aside and notwithstanding any excuse, you and each of you be and personally appear before the judge of our district court of the United States in and for the western district of Arkansas on the first Monday in May, A. D. 1887, it being the 2d day of that month, wheresoever the said court shall then be, and there to answer a bill of complaint exhibited against you in our said court by The Cherokee Nation, and to do further and receive what our said court shall have considered in that behalf, and this you are not to omit under penalty of what the law directs.

In witness whereof Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, has caused the seal of said district court to be hereunto affixed this 18th day of February, A. D. 1887.

[SEAL.] (Signed) STEPHEN WHEELER,
Clerk U. S. Dist. Court, Western District of Arkansas,
By S. A. WILLIAMS, *D. C.*

N. B.—The defendants are required to enter their appearance in the above cause in the clerk's office of this court, in the city of Fort Smith, Sebastian county, Arkansas, on or before the first Monday in April, A. D. 1887, or the said bill will be taken *pro confesso* against them.

Dated at Fort Smith this 18 day of February, A. D. 1887.

[SEAL.] (Signed) STEPHEN WHEELER,
Clerk U. S. Dist. Court, Western District of Arkansas,
By S. A. WILLIAMS, *D. C.*

46 [Endorsed:] No. 34. Cherokee Nation *vs.* Southern Kansas Railway Company. Subpœna in chancery. Issued Feb'y 18th, 1887. Returnable May term, 1887. Filed April 6, 1887. (Signed) S. Wheeler, clerk.

I certify that I served the within summon- at Poncho Station, on the line of the Southern Kansas railway, in the Indian Territory, on the 25th day of February, 1887, by delivering a true copy of the same into the hands of W. E. Doan, an agent of said railway company.

(Signed) JOHN CARROLL,
U. S. Marshal,
By J. C. PETTIGREW, *Deputy.*

47 In the United States District Court for the Western District of Arkansas. In Equity.

THE CHEROKEE NATION
vs.
THE SOUTHERN KANSAS RAILWAY COMPANY.

Comes the said defendant and demurs to the bill herein, and for cause it says—

First. That it appears by the same that this court has no jurisdiction of the matters therein complained of.

Second. That it appears from the face of said bill that there is no equity in the same.

Third. That in the said bill legal and equitable causes of action are sought to be joined in one suit.

Wherefore the defendant prays judgment of the court whether it shall be compelled to answer said bill, and that it may be hence dismissed with its reasonable costs and charges.

(Signed) U. M. & G. B. ROSE,
For Defendant.

48 STATE OF MISSOURI, }
County of Jackson, } *ss:*

On this day came before me, a notary public of said county and State, Geo. M. McCrary, who, being duly sworn, made oath as follows: "I am at present an officer of the defendant company herein—that is to say, I am general counsel of said company—and I say that the above demurrer is not interposed for delay."

(Signed) GEO. M. McCRARY.

Sworn to and subscribed before me.

Witness my hand and seal as such notary this 10th day of March, 1887. My commission as notary expires April 24th, 1890.

[SEAL.] (Signed) FRED. P. BARNETT,
Notary Public, Jackson Co., Mo.

I, U. M. Rose, of counsel in the above-entitled cause, hereby certify that, in my opinion, the above demurrer is well founded in point of law.

M'ch 8, 1887.

(Signed) U. M. ROSE.

(Endorsements thereon:) The Cherokee Nation *vs.* Southern Kansas Railway Co. Demurrer to bill. Filed M'ch 16th, 1887. (Signed) Stephen Wheeler, clerk. U. M. & G. B. Rose.

49 UNITED STATES OF AMERICA,
Western District of Arkansas:

In the District Court of the United States for the Western District of Arkansas. February Term, 1888.

CHEROKEE NATION
vs.
SOUTHERN KANSAS RAILWAY COMPANY. } No. 34.

Complaint in equity.

TUESDAY MORNING, *Feb'y 21st*, 1888—8½ o'clock.

Court met pursuant to adjournment.

Present: The Honorable Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

Now, on this day, the demurrer in this case, which was heretofore

submitted to the court on the argument of the counsel on the respective sides of the case, presented by briefs, being taken up by the court after the same had been taken under advisement and duly considered by the court, was sustained by the court.

And it is hereby ordered that the same be sustained, and that the injunction prayed for in the bill be refused, and that a hearing on the question of damages be refused, because of a misjoinder of equitable and legal causes of action, and that the bill, for want of equity, be dismissed without prejudice, and that defendant have judgment against plaintiff for its costs in this behalf laid out and expended.

50&51 United States District Court, Western District of Arkansas.
In Equity.

THE CHEROKEE NATION
vs.
THE SOUTHERN KANSAS R'Y CO.

From the decree entered herein sustaining the demurrer and dismissing the complainant's bill the complainant, by its solicitors, prays and gives notice of an appeal to the Supreme Court of the United States.

(Signed) McDONALD, BRIGHT & FAY,
Solicitors for Complainant.

(Upon which is the following endorsement:) No. 34. In U. S. dist. court, west. D. of Ark. In equity. The Cherokee Nation *vs.* The Southern Kansas R'y Co. Motion for appeal. Filed March 2d, 1888. S. Wheeler, clerk, by Ed. Haglin, D. C. McDonald, Bright & Fay, sol's for comp.

52&53 UNITED STATES OF AMERICA,
Western District of Arkansas:

In the District Court of the United States for the Western District of Arkansas. February Term, 1888.

CHEROKEE NATION
vs.
SOUTHERN KANSAS RAILWAY COMPANY. } No. 34.

Complaint in equity.

FRIDAY MORNING, *March 2d*, 1888—8½ o'clock.

Court met pursuant to adjournment.

Present: The Honorable Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

On this day — the complainants, by their solicitors, Mess. McDonald, Bright and Fay, and file motion praying an appeal from the final

ruling of this court in this cause to the Supreme Court of the United States, which is granted.

And it is ordered that complainants have twenty days in which to file appeal bond in sum of five hundred dollars for costs.

CHEROKEE NATION
vs.
SOUTHERN KANSAS RAILWAY CO. } No. 34.

Complaint in equity.

FRIDAY MORNING, *March 9th*, 1888—8 o'clock.

Court met pursuant to adjournment.

Present: The Honorable Isaac C. Parker, judge of the district court of the United States for the western district of Ark.

54 On this day appeal bond for costs was filed in this cause and the same, upon examination, was approved by the court.

55 UNITED STATES OF AMERICA,
Western District of Arkansas:

CHEROKEE NATION
vs.
SOUTHERN KANSAS RAILWAY CO. } No. 34.

Complaint in equity.

We undertake and are bound to the defendant, The Southern Kansas Railway Company, in the sum of five hundred dollars, that the complainant, The Cherokee Nation, shall pay all costs said defendant may incur by reason of an appeal of this cause to the Supreme Court, if said appeal is wrongfully taken.

Given under our hands and seals, at Washington city, District of Columbia, the 6th day of March, A. D. 1888.

(Signed) THE CHEROKEE NATION,
By JNO. C. FAY, *Att'y.*
(Signed) J. E. McDONALD.
(Signed) JNO. C. FAY.

Approved—
(Signed) I. C. PARKER,
U. S. Dist. Judge.

DISTRICT OF COLUMBIA, *ss:*

Joseph E. McDonald and John C. Fay, sureties, being duly sworn, say that they are each worth the sum of five hundred dollars over and above all their just debts and liabilities.

Sworn & subscribed before me this 6th day of March, A. D. 1888.

[SEAL.] (Signed) ISAAC C. SLATER,
Notary Public.

56 (Endorsements thereon:) Cherokee Nation *vs.* So. Kans. R'y Co. Appeal bond. Filed March 9th, 1888. (Signed) Stephen Wheeler, clerk.

57 *Judge Parker's Decision.*

CHEROKEE NATION *vs.* SOUTHERN KANSAS R. R. CO.

The right of eminent domain in the Indian country. Who has it—the Government of the United States or the Indian nations?

58 In the District Court for the Western District of Arkansas. February Term, A. D. 1888.

CHEROKEE NATION
vs.
SOUTHERN KANSAS RAILROAD COMPANY.

FEBRUARY 22, 1888.

Eminent Domain—What It Is.

It is the rightful authority which exists in every sovereignty to control and regulate those rights of a public nature which pertain to its citizens in common and to appropriate and control individual property without the consent of the owner, upon the payment of just compensation to the owner, for the public benefit, as the public safety, necessity, convenience, or welfare may demand.

To What It Pertains.

Eminent domain pertains alone to sovereignty. It belongs to no other power. It is one of the attributes of sovereignty.

Title of Lands of Cherokees.

The title to all the lands of the Cherokee Nation was obtained by grant from the United States.

This title is a base qualified or determinable fee, without the right of reversion, but only the possibility of reversion in the United States.

This in effect puts all the estate in the Cherokee Nation.

Powers of Congress.

Congress cannot grant a right of way over the lands of the Cher-
okee Nation without its consent on the ground that the
59 United States has title to such land. If it can do so it must be done because the Government of the United States can exercise with reference to the lands of the Cherokee Nation the right of eminent domain.

Sovereignty—What It Is.

By sovereignty in its largest sense is meant supreme, absolute, uncontrollable power, the *jus summi impirii*, the absolute right to govern. Sovereignty in government is that public authority which directs or orders what is to be done by each member of society in relation to the end of the association or organization.

Government is not sovereignty, but it is the machinery or expedient for expressing the will of the sovereign power.

Eminent Domain—What It Grows Out of.

The right of eminent domain does not grow out of the tenure by which lands are held. When a government asserts the right it admits title in the one against whom it is asserted. The right of eminent domain exists independent of the consideration whether the lands would escheat to the Government in case of a failure of heirs.

Cherokee Nation—Under What Political Control.

The Cherokee Nation, whilst it owns the soil of its country, is under the political control of the United States, and it is dependent on it for its political rights.

This, as the history of this country has so often demonstrated, is necessary for the protection of its people.

The Cherokees Not Sovereign.

The Cherokee Nation is not, therefore, sovereign, for its dependence on the United States forbids the idea of the existence of sovereignty in it as against the United States. If not sovereign, it cannot, as against the United States, have the right of eminent domain as an inherent right.

It cannot have it because it has been granted to it by the Government, as the Government cannot grant away the sovereign powers of the people.

The Difference Between the Rights of Property and the Right of Sovereignty.

The rights of property are defined and become vested according to the terms of the grant. The right of sovereignty is inalienable and rests in the discretion of the Government, to be exercised without let or hindrance over any part of its territory subject to its political control.

In a case where it exists in the Government of the United States every provision of a law or treaty purporting to restrain its full and free exercise by the Government would be void.

The Right of Eminent Domain Belongs Either to the Federal Government or the Government of the States.

60 The right to be exercised in a State must be obtained from the State in all cases except where the Federal Government seeks to exercise it as being necessary to the enjoyment of the powers conferred upon it by the Constitution.

In the Territories the right of eminent domain belongs to the Federal Government.

Status of Cherokee Nation.

The Cherokee Nation is neither a State or Territory in the sense of these words as used in the Constitution of the United States. It has a qualified autonomy, a local government, but it does not come within the meaning of either a State or Territory, but it is a part of what is called Indian country.

The Cherokee Indians are under an Indian Agent.

Their tribal organization is recognized by the political department of the National Government as existing, although their primitive habits and customs are largely broken into by the progress they have made toward civilization. Yet while the intercourse laws enacted by the National Government are applicable to them, though they may have a local government of their own, it cannot with any reason be said that, as against the Government of the United States, they are a sovereign people or have the power which is inherent in sovereignty.

That they are not sovereign is apparent from the treaties made with them by the United States, from the laws of Congress enacted for their government, and from the opinions as to their status delivered at different times in the history of the country by the Supreme Court of the United States.

Eminent Domain Cannot be Delegated.

The right of eminent domain cannot be delegated.

The enjoyment of whatever privileges or rights may flow from the power having been exercised may be granted to another than the sovereign, but when the power will be invoked is to be determined by the agent of the sovereign—in this case the Congress of the United States as the agent of the people thereof. Congress can only exercise the right of eminent domain and cannot grant to another the power of saying when it shall be exercised.

In Favor of What Purpose Can the Right of Eminent Domain be Exercised?

The use of the rights or privileges flowing from the exercise of eminent domain may be granted by the sovereign power to a rail-

road company because this is for the public benefit, safety, necessity, convenience, and welfare.

This, then, is a proper case for the exercise by Congress of this great sovereign right.

The bill in this case contains substantially the following allegations:

I. The plaintiff is a sovereign State, recognized as such by
61 the several treaties with the United States, which are particularly mentioned.

II. Within its territory the plaintiff has the right of eminent domain, as well as all other sovereign attributes.

III. For a valuable consideration the United States has conveyed and patented said territory to plaintiff in fee simple.

IV. Plaintiff retains the right of sovereignty over all the territory thus patented, save as to certain tracts of land which were receded to the United States by the treaty of 1866, and which are not in question in this suit.

V. On or about the 21st day of October, 1886, the defendant, being a corporation created by the laws of the State of Kansas, without right and without authority, consent, or license of plaintiff, entered the territory of the plaintiff and commenced to construct a railway through the same.

VI. The defendant has built about ten miles of the road and intends to build the remainder, to the great damage of the plaintiff.

VII. The defendant pretends to have the right to build said road by virtue of an act of Congress, approved July 4th, 1884, granting the right of way through said territory, but the United States had no right to grant said right of way, the territory having been ceded to the plaintiff as aforesaid.

VIII. Plaintiff, through its national council, by an act passed December 12th, 1884, protested against the building of said railway, and filed a copy of said protest with the Secretary of the Interior of the United States, and by an act of the same date instructed its delegates at Washington to resist the claim of defendant to build or maintain any railway through its territory.

IX. On the 14th day of April, 1886, said national council, being, by the Secretary of the Interior of the United States, notified of the filing of a map in his Department by the defendant, pretending to locate its line of railway through said territory, by act of that date further protested against said location of said railway or the appropriation of said territory of the plaintiff without its consent, and further dissented from and declined to receive as adequate compensation the sum fixed in said act of July 4th, 1884, for the right of way through the Indian Territory.

62 X. Notwithstanding the said several protests, the defendant still claims to act under color of said act of Congress and has procured to be appointed by the President of the United States certain referees or commissioners, to wit, M. Galloway, James Brodie, and W. H. Dyer, who have wrongfully undertaken to appraise the rights of plaintiff in the lands and territory embraced by the line of said location, filed by defendant in the Department of the Interior

aforesaid, and have pretended to award to the plaintiff therefor the sum of $3,301.50 for the lands embraced in the main line and $4,061.44 for the lands embraced in the branch lines of the defendant.

XI. On the 29th day of October, 1886, the acting Commissioner of Indian Affairs, by a communication of that date, informed the plaintiff, through its principal chief, of said pretended finding and award of said pretended referees or commissioners.

XII. Thereupon the plaintiff, by its national council, on the 17th day of December, 1886, by an act of that date, further protested against the assumed grant of the right of way and dissented from the said award as being entirely inadequate; and on the same day the plaintiff, without waiving any of its rights, appealed to this court from said award and from all the proceedings had under said act, and requested the Secretary of the Interior to transmit a transcript of said award and of all other proceedings had under said act of Congress.

XIII. Without admitting the authority of said referees to act in the premises, their award is wholly inadequate, as said right of way is reasonably worth $500 a mile, and plaintiff protests against said inadequacy, as well as against the power of said referees, and prays that this complaint may be treated as an original complaint and petition on appeal from said award, as provided by section three of said act of Congress.

XIV. The defendant will continue to build its road through said territory unless restrained by the court.

XV. By section eight of said act of Congress jurisdiction of all contests between said plaintiff and said defendant is bestowed on this court, and — of all of said proceedings have been returned into this court by said Secretary of the Interior.

63 The prayer of the bill is:

I. That the defendant be required to answer the bill.

II. That the award be set aside.

III. That defendant be restrained from building or operating a railway, telegraph, or telephone line through its territory, and that an injunction be enforced during the pendency of this suit.

IV. That, in case the court shall not issue said injunction, the plaintiff be awarded adequate compensation for the lands proposed to be taken for the right of way and for the rights, easements, and franchises proposed to be granted to the defendant.

V. And for all other proper relief.

The purport of the act of Congress thus referred to may be sufficiently shown by the following abstract of the same:

SECTION 1. Gives to the defendant the right to locate, construct, equip, and operate a railway, telegraph, and telephone line through the Indian Territory on a certain route therein described.

SEC. 2. Prescribes the width of the right of way of the railway company.

SEC. 3. "That before said railway shall be constructed through any lands held by individual occupants, according to the laws, customs, and usages of any of the Indian nations or tribes through

which it may be constructed, full compensation shall be made to such occupants for all property to be taken or damage done by reason of the construction of said railway. In case of failure to make amicable settlement with any occupant, such compensation shall be determined by the appraisement of three disinterested referees to be appointed by the President, who, before entering upon the duties of their appointment, shall take and subscribe before competent authority an oath that they will faithfully and impartially discharge the duties of their appointment, which oath, duly certified, shall be returned with their award. In case the referees cannot agree, then any two of them are authorized to make the award. Either party being dissatisfied with the finding of the referees shall have the right, within ninety days after the making of the award and notice of the same, to appeal by original petition to the courts, where the case shall be tried *de novo*.

When proceedings have been commenced in court the rail-
64 way shall pay double the amount of the award into court to abide the judgement thereof and shall have the right to enter upon the property sought to be condemned and proceed with the construction of the railroad.

Each of the referees shall receive for their (his) services the sum of four dollars per day for each day they are (he is) engaged in the trial of any case submitted to them under this act, with mileage at five cents per mile. Witnesses shall receive the usual fees allowed by the courts of said nation. Costs, including compensation of the referees, shall be made a part of the award and paid by the railroad company."

SEC. 4. This section relates to the rates and charges of the railway company.

SEC. 5. That said railway company shall pay to the Secretary of the Interior, for the benefit of the particular nations or tribes through whose lands said main line and branch may be located, the sum of fifty dollars, in addition to compensation provided for in this act, for property taken and damage done by the construction of the railway, for each mile of railway that it may construct in said territory, said payments to be made in installments of five hundred dollars as each ten miles of road is graded.

Said company shall also pay so long as said territory is owned and occupied by the Indians, to the Secretary of the Interior, the sum of fifteen dollars per annum for each mile of railway that it may construct in said territory. The money paid to the Secretary of the Interior under the provisions of this act shall be apportioned by him, in accordance with the laws and treaties now in force among the different nations and tribes, according to the number of miles of railway that may be constructed by said railway company; that Congress shall have the right, so long as said lands are occupied and possessed by said nations and tribes, to impose such additional taxes on said railroad as it may deem just and proper for their benefit: Provided further, That if the general council of either of the nations or tribes through whose lands said railway may be located shall, within four months after the filing of maps of definite location,

as set forth in section six of this act, dissent from the allowance provided for in this section and shall certify the same to the
65 Secretary of the Interior, then all compensation to be paid to such dissenting nation or tribe under the provisions of this act shall be determined as provided in section three for the determination of the compensation to be paid to the individual occupant of lands, with the right of appeal to the courts upon the same terms, conditions, and requirements as therein provided: Provided further, That the amount awarded or adjudged to be paid by said railway company for said dissenting nation or tribe shall be in lieu of the compensation that said nation or tribe would be entitled to receive under the provisions of this section. Nothing in this act shall be construed to prohibit Congress from imposing taxes upon said railway, nor any Territory or State hereafter formed, through which said railway shall have been established, from exercising the like power as to such part of said railway as may lie within its limits. Said railway company shall have the right to survey and locate its railway immediately after the passage of this act.

SEC. 6. Provides for filing maps of surveys in the office of the Secretary of the Interior and in the offices of the principal chiefs of the tribes. The company is to commence grading its line of road within six months after its location.

SEC. 7. Gives the right of the officers and servants of the company to reside on the right of way.

SEC. 8. Gives jurisdiction of all controversies between any of the tribes and the company to the United States district court for the northern district of Texas, to this court, and to the district court of Kansas, without regard to the amount in controversy.

SEC. 9. Fixes the time and manner of constructing the road.

SEC. 10. Prohibits the company from all efforts to extinguish the title of the Indians to their other lands.

SEC. 11. Provides that all mortgages executed by the company on any of its lands and franchises in the Indian Territory shall be recorded in the Department of the Interior.

SEC. 12. "Congress may, at any time, add to, alter, or repeal this act."

Defendant demurs—

First. For want of jurisdiction.

Second. For want of equity.

66 Third. Because the suit is one that attempts to join legal and equitable causes of action.

McDonald, Bright & Fay and E. C. Boudinot, for plaintiffs; U. M. Rose and G. B. Rose, for defendant.

PARKER, *J.*:

The controlling question in this case is, Did the Congress of the United States have the right to grant to defendant a right of way for its railroad across or over the land of the Cherokee Nation, the defendant paying the nation for the same and the individual occupants for their improvements. If Congress had that right the court has jurisdiction, and that would dispose of the first ground of de-

murrer. The determination of this question settles the second ground, for if Congress has the right to grant the right of way to defendant upon its paying for the same there is no equity in the bill of the plaintiff. If it does not have the right to make the grant, then either the whole act would be void or so much of it as to leave nothing to which the valid part is applicable, and this cause of demurrer in such case would be unnecessary, as the case would be decided on the first ground. Congress can only have this right either because the title of this real estate is in the United States or because the Government of the United States can exercise what is called the right of eminent domain and take the property or authorize a railroad to take it on its paying just compensation to the owners by the exercise of the power growing out of this right. This court held in The United States against Reese, 5th Dillon, 405, and in The United States against Rogers, 23 Fed. Rep., 658, that the title to the lands of the Cherokees was obtained from the United States by grant. This title is a base, qualified, or determinable fee, without the right of reversion, but only the possibility of reversion, in the United States. This, in effect, puts all the estate in the Cherokee Nation. This is, in substance, the principle declared by the Supreme Court of the United States in Holden against Joy, 17th Wallace, 211. Congress could not, therefore, without the consent of the Cherokee Nation and individual occupants of its land, grant to defendant this right of way because the United States had title to the land or because it was either a part of the public domain or a reservation belonging to the Government. If it can be done at all it must be because the Government of the United States can exercise, with reference to the lands of the Cherokee Nation, the right of eminent domain. If the Government does not have this right, then the act of Congress purporting to grant the right of way is void because of the absence of constitutional power to pass it. To ascertain the existence or non-existence of the right in the Government—to ascertain whether it is there or in the Cherokee Nation—requires that we should see what is meant by the right of eminent domain. Then we must look to the political status of the Cherokee Nation and see what are its political relations to the Government of the United States.

Eminent domain is generally defined as "that superior do-
67 minion of sovereign power over all the property within the State, including that previously granted by itself, which authorizes it to appropriate any part thereof necessary to public use, reasonable compensation being made." In Boom Co. against Patterson, 98 U. S., 406, the right is tersely defined to be "the right to take private property for public use." Mr. Cooley, in Constitutional Limitations, pages 523–'24, says eminent domain "is the rightful authority which exists in every sovereignty to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit as the public safety, necessity, convenience, or welfare may demand."

Again, at the same page, when speaking of eminent domain in reference to those cases in which the Government is called upon to

appropriate property against the will of the owners, he says: "It may be defined to be that superior right of property pertaining to sovereignty by which the private property acquired by its citizens under its protection may be taken or its use controlled for the public benefit without regard to the wishes of its owners."

We see by these definitions that this right of eminent domain is one which pertains alone to sovereignty. It belongs to no other power than sovereign power. It is one of the attributes of sovereignty. Therefore if we can find what sovereignty means and can ascertain what is the political status of the Cherokee Nation when considered with reference to the Government of the United States, we can see where resides this chief attribute of sovereignty called eminent domain. Vattel, in his Law of Nations, Book 1, page 1, says: "From the very design that induces a number of men to form a society which has its common interests and which is to act in concert, it is necessary that there should be established a public authority to order and direct what is to be done by each in relation to the end of the association. This political authority is the sovereignty, and he and they who are invested with it are the sovereign. Sovereignty in government may then be defined to be that public authority which directs or orders what is to be done by each member associated in relation to the end of the association."

It may be remarked with us the body of the nation has kept in its own hands the empire or the right to command, and our Government is therefore called a popular Government. Wheaton defines sovereignty: "The supreme power by which any citizen is governed." Hurd says: "The supreme power in the State must necessarily be absolute in being subject to no judge. Jameson says: "By the term 'sovereignty' is meant the person or body of persons in a State to whom there is politically no superior." Leiber has said: "The necessary existence of the State and that right and power which necessarily follows is sovereignty." Story says: "By sovereignty, in its largest sense, is meant supreme, absolute, uncontrollable power, the *jus summi impirii*, the absolute right to govern." Yeaman, in his Study of Government, 484, says: "This sovereignty is the last and supreme will in the direction and control of the affairs of
68 society, and beyond or above which there is no political power and no legal appeal. The word which by itself comes nearest being the definition of sovereignty is will or volition as applied to political affairs. Government is not sovereignty. Government is the machinery or expedient for expressing the will of the sovereign power."

Definitions of sovereignty might be almost indefinitely multiplied, but these which have been given I believe to be sufficient to give an accurate idea of its nature. This sovereign power in our government belongs to the people, and the Government of the United States and the governments of the several States are but the machinery for expounding or expressing the will of the sovereign power.

Eminent domain is said to be such an inherent and essential element of sovereignty that it results from the social compact, and

hence would exist without any express provision of the organic law on the subject.

Brown *vs.* Bradley, 69 Am. Dc., 389.
Moale *vs.* The City of Baltimore, 61 Am. Dc., 278.
Alexander *vs.* Mayor, 46 Am. Dc., 630.

The right of eminent domain is a right distinguished from and paramount to ultimate ownership.

Kohl *vs.* U. S., 91st U. S., 371.

The right of eminent domain does not grow out of the tenure by which lands are held.

Kohl *vs.* U. S., *supra.*

In effect, when the Government asserts the right of eminent domain it admits that the title is in the one against whom the right is asserted.

If the Government has the title it simply donates its own real property existing as public domain or as Government reservations. This is not the assertion of eminent domain, but an appropriation by the Government of that property to which it has a title.

When the Government takes property by right of eminent domain it takes it by an assertion of a sovereign right and does not take it by reason of the title being in it. In the case of Kohl, *supra*, the Supreme Court says: "This right exists independent of the consideration whether the lands would escheat to the Government in case of the failure of heirs. The right is the offspring of political necessity, and is one inseparable from sovereignty unless denied to it by the fundamental law."

The Cherokee Nation, while it owns the soil of its country, is under either the political control of the United States or of the States of this Union; for, under this Government, as was said by Mr. Justice Miller, in United States *vs.* Kagama, 118 U. S., 379: "There exists within the broad domain of sovereignty but these two." Since the cases of the Cherokee Nation *vs.* Georgia, 5th Peters, page 1, and Worcester *vs.* The State of Georgia, 6th Peters, 515, we have known that the Cherokee Indians were not under the political control of the States; therefore they must be under the political control of the Government of the United States; for certainly it can-
69 not be asserted that this community of people are possessed of such political power as they are not subject to the sovereign will of the United States.

Mr. Justice Taney, in The U. S. *vs.* Rogers, 4th Howard, 572, said: "We think it too clearly and firmly established to admit of dispute that the Indian tribes residing within the territorial limits of the United States are subject to their authority." In The United States *vs.* Kagama, *supra*, Mr. Justice Miller, speaking for the Court in language of a general character, says: "These Indian tribes are the wards of the nation. They are communities dependent on the United States; * * * dependent for their political rights."

Again at the same page: "The power of the General Government over these remnants of a race once powerful, now weak and dimin-

ished in numbers, is necessary to their protection. * * * It must exist in that Government because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it never has been denied, and because it alone can enforce its laws on all the tribes."

The political status of the Choctaw Nation of Indians, as far as its relation to the United States is concerned, is precisely like that of the Cherokee Nation. In the case of the Choctaw Nation *vs.* The United States, 119 U. S., 28, the Court, when speaking of the status of that nation, said: "The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care of the former, and which, while it authorizes the adoption on the part of the U. S. of some such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of its acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection."

Chief Justice Marshall, in Cherokee Nation *vs.* Georgia, 5th Peters, 1, used this language: "It may well be doubted whether those tribes which reside within the acknowledged boundaries of the U. S. can, with strict accuracy, be denominated foreign nations. They may more correctly, perhaps, be denominated domestic dependent nations. * * * They are in a state of pupilage. Their relations to the U. S. resemble that of a ward to his guardian. They look to our Government for protection, rely upon its kindness and its power, appeal to it for relief to their wants, and address the President as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States that any attempt to acquire their lands or to form a political connection with them would be considered by all as an invasion of our territory and as an act of hostility."

If they are a dependent nation, upon whom are they dependent? Not upon the States, but upon the United States. This dependence is a political one, and its very existence implies political control in some other power than their government. The existence of this dependence and political control forbids the existence of sovereignty in their nation. The non-existence of sovereignty forbids the existence as an inherent right of eminent domain. Then the Cherokees could not possess the right of eminent domain as an inherent principle of their government. It cannot exist except inherently, from the nature of the power in government, or by grant from some sovereign power. But it must be remembered under our Government all sovereign power is lodged in the people, and the Government, by its different departments, can exercise only such power as has been delegated to it by the people. None of these delegated powers can be by the Government delegated to some one else. They are only granted to the Government to be in proper cases exercised by it, and not to be given to another to be exercised by that other. It is well in this connection to note the distinction between the rights of property and the right of sovereignty. The

first are defined and become vested according to the terms of the grant; the second is inalienable and rests in the discretion of the Government to be exercised without let or hindrance over any part of its territory. In a case where it exists in the Government of the United States every provision of a law or treaty purporting to restrain its full and free exercise by the Government would be void.

In my judgment the law-making power of the country has no such a right conferred upon it by the people of this nation as to enable it to carve out from the midst of the public domain a portion of territory which shall be exempt from its governmental control, when that territory is in such a political condition as to be neither a State or Territory, according to the constitutional meaning of these words. The right to grant away or delegate the sovereign power of the nation has never for a moment been conceded as respects a foreign State to the President, by and with the consent of the Senate, as within the treaty-making power, nor can it be claimed to be within the power of Congress. If from our system of government it is not in either, how can it be claimed as belonging to the Indian tribes? There can be no doubt that the general sovereignty of the Government, which for public reasons and the public good, is exercised over the persons and property of the nation, is a power wholly distinct and separate from that which deals with adverse claims of title to real and personal property. The one attaches to the soil and people as an inalienable attribute, inherent in the very nature of the Government. The other is a mere question of vested rights dependent upon the true construction of the instruments of title under the Constitution and laws.

Mr. Cooley, in Constitutional Limitations, 524, says: "When the existence of a political power in the Government is recognized on the ground of necessity, no delegation of the legislative power by the people can be held to vest authority in the department which holds it in trust, to bargain away such power, or to so tie up the hands of the Government as to preclude its repeated exercise as often and under such circumstances as the needs of the Government may
71 require. For, if this were otherwise, the authority to make laws for the government and welfare of the State may be so exercised in strict conformity with the Constitution as at length to preclude the State performing its ordinary and essential functions, and the agent chosen to govern the State might put an end to the State itself. It must follow that any legislative bargain in restraint of the complete, continuous, and repeated exercise of the right of eminent domain is unwarranted and void."

I think the political status of the Cherokee Nation has been shown with sufficient clearness by reference to the opinions of the Supreme Court of the United States, delivered at different times in the history of this people and this Government. These opinions, as expressions in regard to their condition of political dependence on the United States, do not need anything to give them clearness or strength; but if they did, it can be found in the different treaties heretofore made with these people and in the laws enacted for the government of their country at different times by the Congress of the United States.

On the 28th of November, 1785, the United States made the first treaty with the Cherokees. By it they acknowledged "that all the Cherokees were under the protection of the United States and no other sovereign whatever." The 9th art. provided that, for the benefit and comfort of the Indians and for the prevention of injuries or oppressions on the part of the citizens to Indians, the United States should "have the sole and exclusive right of regulating the trade with the Indians and managing all their affairs in such manner as they think proper."

On the 2nd of July, 1791, another treaty was made with them. In the second art. of this treaty they said: "The undersigned chiefs and warriors, for themselves and all parts of the Cherokee Nation, do acknowledge themselves and the said Cherokee Nation to be under the protection of the United States of America and of no other sovereign whatsoever."

Here, when relations were first established with them by the United States, we find in the very first treaty ever made with them that they placed themselves under the protection of the United States, admitting that they were their sovereign, to which they looked for security and protection. It must be remembered that they have remained under that protection to this time. Again, in the 5th art. of the treaty of May 23rd, 1836, we find them looking to their sovereign to give them a right to enact certain local legislation. This art., among other things, provides the United States "shall secure to the Cherokee Nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country." * * * Here we find the origin of their local government as the same is recognized by the sovereign, the Government of the United States, and we find it emanating directly from that Government.

By the 12th art. of the treaty of July 10th, 1866, the Cherokee Nation agreed that a general council should be held, to be made up of delegates of the different tribes or nations lawfully residing within the Indian Territory. By the provisions of this art. of the treaty there was to be called into existence a law-making power, for the whole of the Indian country belonging to the five civilized tribes and other Indians lawfully in the country, somewhat similar to our territorial governments. The council was to be convened under the direction of the Commissioner of Indian Affairs. It was to be presided over by such person as the Secretary of the Interior should designate. It was to have a secretary, who was to keep an accurate record of its proceedings and transmit a duly certified copy thereof to the Secretary of the Interior. The members of the council and secretary were to be paid by the United States. It enumerated the legislative power of the council and provided that such power might be enlarged by the consent of the national council of each nation or tribe assenting to its establishment and with the approval of the President of the United States; and, finally, it provided that all laws enacted by such council shall take effect at such

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time as may therein be provided, unless suspended by direction of the President of the United States.

The claim that people situated as indicated by this article of the treaty of 1866, as against the Government of the United States, are a sovereign people, is, to my mind, little less than absurd.

Unless the right to exercise the powers of local government were of such nature as to give to the Cherokee Nation the character of a State in this Union, there was not conferred on it the right of eminent domain, as this great right, attendant upon sovereignty, belongs in this country either to the Federal Government or the government of the States.

Under our dual system of government, before the original colonial States entered the Federal Union, this right of eminent domain belonged to them, and when they entered the Union they retained the right to protect and regulate private rights, privileges, and immunities in general. Because this right was retained as one of the powers of the State governments, and because under our political organization it was expected that these governments would make provision for those conveniences and necessities which are usually provided for the citizens through the exercise of eminent domain, the right itself, when sought to be exercised in a State, must be obtained from the State in all cases, except where the Government of the United States seeks to exercise the right for its own purposes, as in a case where it desires a site for a court-house, custom-house, post office, arsenal, dock-yard, navy-yard, or any other purpose of the Government. In such case the right of eminent domain is in the Federal Government in every case, and may be exercised by it in the States so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution. Kohl *et al. vs.* U. S., 91 U. S., 367; Trombley *vs.* Humphreys, 23rd Michigan, 471; Dickey *vs.* Turnpike Co., 7th Dana, 113; McCollough *vs.* Maryland, 4th Wheaton, 429; Cooley on Constitutional Limitations, 526.

This right was retained, with the above exception, by the original thirteen States when they came into the Union. The new States have been admitted into the Union on the same footing as
73 the original thirteen. Thus they have this right of eminent domain. I think it very clear that in the Territories the right of eminent domain belongs to the Federal Government alone because of their dependence upon that Government and because of the fact of their having no sovereign power.

Mr. Cooley, in Constitutional Limitations, 526, says: "In the new Territories, however, where the Government of the United States exercises sovereign authority, it possesses, as an incident thereto, the right of eminent domain, which it may exercise directly or through the Territorial Governments, but this right passes from the nation to the newly-formed State whenever the latter is admitted into the Union."

This court held in *Ex parte* Morgan 20, Federal Reporter, 298, that the Cherokee Nation is neither a State or Territory in the sense of these words as used in the Constitution of the United States. It has a qualified autonomy, a local government, but it does not come

within the meaning of either a State or Territory, but is a part of what is called Indian country. If this be true, it is subject to the statutes of the United States, which make up what is called the intercourse law, regulating the intercourse of the Government and people of the United States with the Indian tribes. The construction of every provision of this law is against the idea of the sovereignty of the Cherokee Nation. The importance of the question involved will warrant a reference to a few leading sections of this law as it now exists. We find from the year 1800 the Congress of the nation has legislated in regard to the government of the Indian country. By the act of June 30th, 1834, there was a consolidation of many of the former provisions passed since the year 1800. Others were altered by this last act, so that by the act of 1834 there was established a new Indian code. This code was amended by the act of March 3rd, 1847. All of this legislation was amended and re-enacted in the shape in which it now exists by the revision of the laws of the United States of 1873; and the law on the subject is found in the Revised Statutes of the United States, chapter 3, page 369, and chapter 4, page 371. Section 2114 provides: "The President is authorized to exercise general superintendence and care over any tribe or nation which was removed upon an exchange of territory under authority of the act of May 28th, 1830, 'to provide for an exchange of lands with the Indians residing in any of the States and Territories, and for their removal west of the Mississippi, and to cause such a nation to be protected at their new residence against all interruption or disturbance from any other tribe or nation of Indians or from any other person or persons.'" The Cherokee tribe or nation was removed from their home east of the Mississippi river to their present home by authority of this act of May 28, 1830. The Cherokees are still under the control of an Indian agent appointed by the President and confirmed by the Senate. Section 2058, Revised Statutes, provides that this agent * * * "shall superintend the intercourse with the Indians, agreeably to law, and execute and perform such regulations and duties, not inconsistent with law, as may be prescribed by the President, the
74 Secretary of the Interior, the Commissioner of Indian Affairs, or the Superintendent of Indian Affairs."

Under section 2103, Revised Statutes: "No agreement shall be made by any person with any tribe of Indians or individual Indian not citizens of the United States for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him or any other person, in consideration of services for said Indians, relative to their lands or to any claims growing out of or in reference to annuities, installments, or other moneys, claims, demands, or things under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States," unless such contract or agreement be executed and approved as provided by a subsequent part of the section. This provides the contract shall be executed before a judge of a court of record and bear the

approval of the Secretary of the Interior and the Commissioner of Indian Affairs endorsed on it.

By section 2106, Revised Statutes: "No assignment of any contract embraced in section 2103, or any part of one, shall be valid unless the names of the assignees and their residences and occupations be entered in writing on the contract and the consent of the Secretary of the Interior and the Commissioner of Indian Affairs to such assignment be also endorsed thereon."

Section 2116 provides that: "No purchase, grant, lease, or other conveyance of lands or of any title or claim thereto from any Indian nation or tribe of Indians shall be valid in law or equity unless the same be made by treaty or convention entered into pursuant to the Constitution." * * * Section 2117 is that: "Every person who drives or otherwise conveys any stock of horses, mules, or cattle to range and feed on any lands belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock." The statute further provides that the agent of each tribe of Indians is authorized, for the benefit of the Indians, to sell any cattle, horses, or other live stock belonging to the Indians, under such regulations as shall be prescribed by the Secretary of the Interior; that a person, before he shall be permitted to trade with any Indian tribe, is by section 2128 required to give bond to the United States. By section 2132 the President is authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods or of any particular article into the country belonging to any Indian tribe and to direct all licenses to trade with such tribe to be revoked." * * *

Section 2137 contains a prohibition against hunting in the Indian country.

Section 2138 is: "Every person who drives or removes, except by authority of an order lawfully issued by the Secretary of War, * * * any cattle, horses, or other stock from the Indian Territory for the purpose of trade or commerce shall be punish-
75 able, etc." Section 2139 provides that no ardent spirits shall be introduced into the Indian country.

Section 2145 extends the criminal laws of the United States over the Indian country, except as to crimes committed by one Indian upon another. Section 2147 gives the Indian agents and subagents the right to remove all persons from the Indian country who are in there contrary to law. By section 2071 the President may, in his discretion, employ persons to teach Indians in agriculture and their children in the ordinary branches of science.

All of these provisions of law are applicable to the Cherokee Nation. They are under an agent. Their tribal organization is recognized by the political department of the National Government as existing. Although the primitive habits and customs of these people have been largely broken into by the progress they have made towards civilization, yet while these laws, enacted by the National Government, are applicable to them, though they may have a local government of their own, it cannot, with any reason, be said that, as against the Government of the United States, they are a sovereign

people or have the power which is inherent in sovereignty. That their qualified autonomy does not give them sovereignty is apparent from the treaties with them, from the laws enacted by the political department of the Government of the United States for their government, and from the opinions delivered at different times by the Supreme Court of the United States.

We are called on to consider their political relation to the United States and whether their status is such as that they possess sovereign power as against the United States. If they do not have this sovereign power they cannot inherently have the right of eminent domain, because it is an incident of sovereignty only. But it may be asked, If they do not have it inherently, from the nature of their government, can they not have it by grant from the United States, and thus to this extent become sovereign? This is a sovereign power which, as we have seen, cannot be delegated. The enjoyment of whatever privileges or rights may flow from the power of eminent domain, being exercised, may be granted to another than the sovereign; but when the power will be invoked is to be determined by the agent of the sovereign—in this case the Congress of the United States, as the agent of the people. This principle being correct, it must be held that any claims that the treaty-making power or Congress may have granted the right of eminent domain to the Cherokee Nation, and in this respect conferred on it sovereign power, are without foundation, because neither Congress nor the treaty-making power can grant away the sovereign powers of the Government, but they can only exercise them for the people to whom they belong. Then we must conclude that the right of eminent domain as to the Cherokee Nation, although that nation has the title to its lands, is not in it, because its status or relation to the Government of the United States is that of a subordinate to a sovereign, and that sovereign is the United States, in which resides the right of eminent domain when that right is to be invoked in the Cherokee
76 Nation. We have found that the right of eminent domain gives the right to appropriate and control individual property on payment of a just compensation for the public benefit, as the public safety, necessity, convenience, or welfare may demand.

Is the building of defendant's railroad a public convenience? Does it promote the public welfare? Is it a public benefit? If so, Congress may exercise the right of eminent domain by passing a law permitting defendant company to use the fruits flowing from the exercise of the right of eminent domain by Congress to enable it to build its road. Whatever builds up or promotes interstate commerce must be regarded as increasing the public benefit by enhancing its convenience, its comfort, and its general welfare.

This, then, would be a proper case for the exercise by Congress of this great sovereign right, and it has been frequently so held by the courts; as in Boom Co. *vs.* Patterson, 98 U. S., 406; Secombe *vs.* R. R. Co., 23 Wallace, 108; Brown *vs.* Beattie, 69 Am. Dc., 392; Lexington & Ohio R. R. Co. *vs.* Applegate, 33 Am. Dc., 497.

It was held in Secombe *vs.* R. R. Co., *supra:* "If a public interest is to be subserved which demands the taking of private property the

taking of such property for such purpose is a public necessity. The taking of private property in order that a railroad may be constructed is taking to subserve a public interest, and it is, therefore, taking it to meet the demands of public necessity." The same principle is held with equal force in Lexington & Ohio R. R. Co. *vs.* Applegate, *supra*. Congress, then, used this attribute of sovereignty in a proper case when it permitted the defendant company, not to say when eminent domain should be exercised, but as the agent of the public to use the fruits or effects of the exercise of the right as a means of constructing its road to promote the public interest. This view of the case leaves the bill without equity, so that the injunction must be refused and the bill dismissed, unless the court can retain jurisdiction of it to try the question of damages, as it is asked to do by one of the prayers of the bill.

This is a suit in equity. The method of recovering damages under the law of Congress of July 4, 1884, granting the right of way over the lands of the Cherokee Nation, is a proceeding at law. "Whenever a statute grants a new right or a new remedy for the violation of an old right, or whenever such rights and remedies are dependent on State statutes or an act of Congress, the jurisdiction as between the law side and the equity side of the Federal courts must be determined by the essential character of the case. Unless it comes within some of the heads of equitable jurisdiction, the remedy of the party is at law."

Van Norden *vs.* Morton, 99 U. S., 378. There is an adequate remedy at law to recover the damages for right of way. It is obtained in this case by filing an original complaint on the law side of the court praying for an assessment of damages. Legal and equitable causes of action cannot be joined in the Federal courts.

Hunt *vs.* Hollingsworth, 100 U. S., page 100.

The plaintiff, having a plain and adequate remedy at law,
77 cannot in a Federal court join this remedy with one in equity.

The bill seeks alternative relief, and the plaintiff's counsel claim they have a right to so plead. If the relief asked in the alternative is wholly equitable relief the prayer in a suit in equity may be in the alternative, but if the relief asked is both equitable and legal and the prayer is for equitable relief, or if the court cannot grant this relief then for legal relief, this legal relief cannot be granted unless it is incident to and grows out of the equitable action of which the court has jurisdiction; but there is no cause for an equitable action here.

The bill fails, and there is nothing left but the legal right for the recovery of damages, which must, under the Federal practice, be asserted in a court of law, and it cannot be joined with an equitable cause of action and, if it fails, then be asserted in the same suit as a legal remedy. This is now a rule beyond question in the Federal courts. Buzard *vs.* Houston, 119 U. S., 351; Kramer *vs.* Cohn, 119 U. S., 355; Dowell *vs.* Mitchell, 105 U. S., 430; Hunt *vs.* Hollingsworth, *supra*.

The demurrer to the bill must be sustained, injunction refused, and the bill dismissed without prejudice.

78 I, Stephen Wheeler, clerk of the district court of the United States in and for the western district of Arkansas, hereby certify that the within and foregoing is a true and correct transcript of all the proceedings in the case of The Cherokee Nation *vs.* The Southern Kansas Railway Co. as the same appears of record or on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Fort Smith, in said district, this 20th day of March, A. D. 1888.

{ The Seal of the District Court, Western District of Ark., Fort Smith, U. S. A. }

STEPHEN WHEELER, *Clerk.*

Endorsed on cover: W. Arkansas D. C., U. S. No. 1002. The Cherokee Nation, appellant, *vs.* The Southern Kansas Railway Company. Filed April 21, 1888.

Office Supreme Court U. S.
FILED
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JAMES H. MCKENNEY
CLERK

IN THE

Supreme Court of the United States.

THE CHEROKEE NATION, *Appellant*,

vs.

THE SOUTHERN KANSAS RAILWAY COMPANY.

No. 644.

MOTION TO ADVANCE.

Comes now the appellant, by Jos. E. McDonald, Richard J. Bright, and John C. Fay, its attorneys, and moves the court to advance the above-entitled cause on the docket, and to set the same for hearing at some convenient day during the present term.

That at the last term of the court the appellant applied to the court to advance the said cause for hearing at that term, which application was not granted, said application being as follows:

STATEMENT OF THE CASE.

The bill in this case was filed on the equity side of the United States District Court for the Western District of Arkansas, by the Cherokee Nation against the Southern Kansas Railway Company to enjoin the railway company from invading the territory of the Nation, and building a railroad through it without the consent of the Nation.

The bill claims the sovereignty of the Cherokee Nation over the territory in question and the right of eminent domain therein by virtue of its treaties with the United States, whereby the land in question was ceded to the Cherokee Nation for valuable consideration, and was assured to the Nation by letters-patent from the United States.

The bill also states that the defendant Corporation assumes to act under the authority of Congress given by an act approved July 4th, 1884, and that the Nation protested against the Corporation locating its line on Cherokee territory, and declined to receive as *adequate* compensation the sum fixed in said act as compensation.

That at the instance of the Corporation, commissioners were appointed by the President, who have undertaken to appraise the land taken and award the Nation a certain sum as proper compensation, but that the Nation declined to receive such sum, and reserving all its rights as a sovereign Nation, appealed from the award of the commissioners to the United States District Court on the ground of the utter inadequacy of the compensation fixed.

The bill, as alternative relief, prays that if the position of the defendant Corporation as to the power of the United States over the Nation's territory is upheld, then that the bill may be taken as an appeal from the award of the Commissioners, and the proceedings under the act, before the Interior Department, are filed in the cause.

The jurisdiction of all controversies between complainant and defendant, by the act aforesaid, is vested in the District Court. The District Court held the right of eminent domain to be vested in the United States, and upon demurrer dismissed the bill, from which this appeal is prosecuted.

The special and peculiar circumstances relied on for this motion, in addition to the foregoing, are:

First. This is the first attempt made by the United States to grant a right of way through the Indian Territory without the consent of the Indian Nation, to whom the jurisdiction over the country has been ceded by treaties, and involves the constitutional power of Congress to pass the act of July 4, 1884.

Second. That the status of lands ceded by treaty to Indian nations, and the rights of the Indians thereto, and the power of the United States over them, are involved in the decision of this cause, which must control the policy of the United States in dealing with lands of this character.

Third. With respect to the Nation most interested in the present case, if the power of Congress to grant the right of way should be upheld, the compensation for the land taken will be detained from them for a period of from four to six years, pending the appeal.

Fourth. That the question as to whether the right of eminent domain over the Cherokee Country remains in the United States or vests in the Cherokee Nation under the treaties between that Nation and the United States, is a question of great public interest, and involves the legislative power of Congress over the Indian Territory, which ought to be definitely and authoritatively settled by an early decision of the Supreme Court of the United States.

Fifth. That there is considerable legislation now pending before the Congress of the United States involving additional grants of right of way through the Indian Territory, and involving the formation of part of the Indian lands into the proposed territory of Oklahoma, which would be controlled by the decision of the questions presented herein.

That since the denial of said application the matters set out as reasons in the fifth paragraph have greatly increased in importance, and certain negotiations between a commission appointed under the act of March 3, 1889, for the purchase of the land of the Cherokee Nation have been had, and are still pending, and a controversy exists between the Commission and the Nation as to the character of the title of said Nation to said lands, which delays and impedes negotiations.

That the questions so in controversy may be controlled by the decision of this cause, as well as the right and power of Congress to erect a territorial government in the Cherokee Country, which questions are of great public interest to the United States, as well as to the Cherokee Nation.

Therefore the said parties feel constrained again to petition for the advancement of said cause for the additional reasons set forth.

JOSEPH E. MCDONALD,
RICHARD J. BRIGHT,
JOHN C. FAY.
Attorneys for Appellant.

IN THE

Supreme Court of the United States.

THE CHEROKEE NATION,
Appellant,
vs.
THE SOUTHERN KANSAS RAILWAY CO., Appellee.

No. 664.

BRIEF FOR THE APPELLANT.

J. E. McDONALD,
R. J. BRIGHT,
JOHN C. FAY,
Attorneys for Appellant.

PRESS OF THOMAS NEVILL & CO.

IN THE

Supreme Court of the United States.

THE CHEROKEE NATION, Appellant,
vs.
THE SOUTHERN KANSAS RAILWAY CO., Appellee.
No. 664.

Brief for the Appellant.

STATEMENT.

This is an appeal from a decree rendered by the District Court of the United States for the Western District of Arkansas, dismissing the bill of the complainant for want of equity.

In the court below the Cherokee Nation, appellant, filed a suit against the Southern Kansas Railway Company, seeking to enjoin the appellee from locating, constructing, or maintaining a railroad and telegraph line through the land and domain of the Cherokee Nation, which they assumed to build under the provisions of an act of Congress approved July 4, 1884, entitled "An act to grant the right of way through the Indian Territory to the Southern Kansas Railway Company, and for other purposes."

The bill of complaint alleged that the complainant, the Cherokee Nation, is a sovereign State, so recognized by numerous treaties between the Nation and the United States, and by virtue of its sovereign character held the right of eminent domain over its territory; that its territory and domain was ceded and patented to the complainant by the United States, under and by virtue of certain treaties with and letters-patent issued by the United States; that the defendant, the Southern Kansas Railway Company, have commenced the construction of the railway through the territory of the complainant, have cut down the natural surface of the ground, built embankments, appropriated stone, earth, lumber, etc., found on the line of the road, and threaten to carry on the damage and destruction of the property of the complainant, depriving it of large revenues arising from the rental of its property, and causing other irreparable loss and damage; that the defendant assumes and pretends to construct its road through the land and domain of the complainant by virtue of the provisions of the act of Congress, approved July 4, 1884.

The bill further avers that no jurisdiction or authority remains in the United States to grant a right of way through complainant's territory, nor did the right of eminent domain over such territory remain in the United States, but it is vested solely in the complainant, the Cherokee Nation.

That the Cherokee Nation, by its National Council, had protested against the construction of the road, and filed such protest with the Secretary of the Interior of the United States; and further protested, dissented and declined to receive the compensation fixed by the act of July 4, 1884, for the right of way through the Indian Territory. The bill further avers that notwithstanding the several protests and dissents, the defendant procured commissioners or referees to be appointed by the Presi-

dent of the United States, who have wrongfully undertaken to appraise and value the rights of the complainant to the land and territory embraced under the line of location of the defendant's road.

That the complainant, by its National Council, further protested against the assumed grant of the right of way, and dissented from the award of the referees as inadequate, and saving and reserving to itself all objection and dissent before made, appealed to the United States District Court from the award of the referees aforesaid, and from all proceedings had and taken under the act, and requested the Secretary of the Interior to transmit a transcript of the award and all proceedings had under the act of July 4, 1884, to the United States District Court for the Western District of Arkansas.

The bill further charges, even if the referees had been authorized to make an award, the sum awarded was entirely insufficient and inadequate compensation, and while insisting upon their protest against the right of said referees to make an award, further insist that the sum proposed to be awarded is inadequate and insufficient, and ask that the bill of complaint may be taken and treated as an original complaint and petition in appeal under the provisions of section 3, of the act of July 4, 1884.

The bill further alleges that no right can be granted to the defendant to enter upon, or build, the proposed railway through the territory of the complainant, against the consent of the complainant, and avers that great and irreparable damage will ensue to the complainant if the defendant continues to build its road, and that the defendant will do so unless restrained by the Court.

The bill prays for process; that the pretended award may be vacated and set aside; that the defendant may be restrained and perpetually enjoined from locating and constructing a railroad through the domain and

territory of the complainant; and as alternative relief, in the event of the Court declining to grant the injunction, that the complainant may be awarded full, just, and adequate compensation for the lands so proposed to be taken, and for the rights, easement, and franchises proposed to be granted to the defendant. (Record, pp. 1–4.)

Attached to, and made an exhibit to the bill, are the acts of the National Council of the Cherokee Nation, protesting against the act of July 4, 1884; declining to accept the compensation provided in that act; the report of the commissioners or referees awarding compensation; the act of the Cherokee National Council refusing to accept the award; the appeal of the Cherokee Nation from the award; the transcript of the proceedings of the Interior Department, certified by the Secretary to the District Court for the Western District of Arkansas. (Record, pp. 6–17.)

To this bill of complaint the defendants, by their solicitors, appeared on the 7th of March, 1887, and on the 8th of March, 1888, deposited in Court double the amount ($14,705.98) of the award of the commissioners, to assess damages. On the 16th of March, 1887, demurred to the bill: *first*, for want of jurisdiction; *second*, for want of equity, and, *third*, because legal and equitable causes of action are joined in one suit; which demurrer was sustained by the Court on the ground of want of equity in the bill, and a hearing on the question of damages was refused because of a misjoiner of equitable and legal causes of action, and the bill dismissed without prejudice (record, page 21). From this decree the present appeal is prosecuted by the Cherokee Nation.

Assignment of Errors.

First. The Court erred in holding that the right of eminent domain in the Cherokee Territory was vested in the United States.

Second. The Court erred in holding that the act of July 4, 1884, authorizes the building of the railway of the defendant through the territory of the complainant.

Third. That the Court erred in dismissing complainant's bill for want of equity.

Fourth. The Court erred in refusing, as alternative relief, to entertain the bill in this case as an appeal from the award of the commissioners to assess damages.

BRIEF.

First and Second Assignment of Errors.

Under the first and second assignment of errors we will discuss—

First. The status of the complainant.

Second. The right of eminent domain.

Third. The effect of the treaties.

Fourth. The contention of the defendant.

First.—*Status of Complainant.*

It is averred in paragraph 1 of the bill that the Cherokee Nation is a sovereign State, and the treaties made with it by the United States are relied upon to prove its character.

The fact that the United States has concluded TWENTY TREATIES with this NATION ought to be sufficient evidence

of the recognition on the part of the political department of the United States of the character of the complainant as a political State, and this recognition on the part of that department of the Government is conclusive upon the Judiciary. (5 Peters, 16.)

But lest it may be said that the dependent character of the Nation may have some effect, let us examine some of the provisions of the treaties, to see how far their sovereignty is conceded therein.

Articles 1 and 2 of the Treaty of Hopewell, November 22, 1785 (7 Stats., 18), provide for the restoring of prisoners of war taken by the United States and the Cherokees, respectively.

Article 12 provides for a member of Congress.

Article 3, Treaty of Holstein, July 2, 1791 (7 Stats. 39), also provides for restoring prisoners.

Article 4 fixes the boundary of the Nation.

Article 8 provides for punishing citizens of the United States by the Nation for intruding upon their territory.

Article 10 provides for return of fugitives from justice.

Treaty of Tellico, October 2, 1798 (7 Stats., 62), was to "re-establish more fully peace and friendship," and makes cessions of land, fixes boundaries, etc.

Article 7 grants a free road through their territory to citizens of the United States.

Article 4, Treaty of Tellico, April 24, 1806 (7 Stats., 101), grants use of two additional roads through Cherokee territory to citizens of the United States.

Article 2, Treaty of Tellico, June 10, 1806 (7 Stats., 103), grants use of additional road through Cherokee territory for United States mail.

Treaty of Washington, April 8, 1816 (7 Stats., 139): Article 2 grants roads through Cherokee territory.

Treaty of Washington, May 28, 1828 (7 Stats., 311): Article 9 grants road to Fort Gibson, in Cherokee Nation.

Treaty of New Echota, 1835 (7 Stats., 478): Article 6 provides for peace and friendship.

Treaty of Washington, 1846 (9 Stats., 871): Article 1 provides for the United States to deliver up fugitives from justice to the Cherokee Nation.

Treaty of Washington, 1866 (14 Stats., 799): Article 11 grants right of way for railroad through Cherokee territory.

Nearly all the treaties contain cessions of land by the Nation to the United States for considerations expressed therein.

The status of this Nation, before its removal to the Indian Territory, and while it occupied the country of which it had a possessory title only, was defined by Chief Justice Marshall, in the case of the Cherokee Nation *v.* Georgia, 5 Peters, 16, thus:

"So much of the argument as was intended to prove the character of the Cherokees as a State, as a distinct political society separated from others, capable of managing its own affairs and governing itself, has, in the opinion of the majority of the judges, been completely successful. They have been uniformly treated as a State from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violations of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. *The acts of our Government plainly recognize the Cherokee Nation as a* STATE, *and the Courts are bound by those acts.*"

True, the Court held in that case that, within the meaning of section 3, article 3, of the Constitution, the Cherokee Nation was not a *foreign State*, although such eminent jurists as Story and Thompson dissented from such limited construction. The decision, however, fixed the status of the complainant as a sovereign State.

The fact that the Cherokees are a dependent nation does not affect their sovereignty.

Vattel, secs. 4, 5, and 6, defines a sovereign State thus:

"Every nation that governs itself, under what form soever, without dependence on any foreign power, is a sovereign State. We ought, therefore, to account as sovereign States those which have united themselves to another more powerful by an unequal alliance, in which, as Aristotle says, to the more powerful is given more honor, and to the weaker more assistance. The conditions of these unequal alliances may be infinitely varied. But whatever they are, provided the inferior ally reserve to itself the sovereignty, *or the right of governing its own body*, it ought to be considered as an independent State. * * * Consequently a weak State, which, in order to provide for its safety, places itself under the protection of a more powerful one, &c., * * without, however, divesting itself of the right of government and sovereignty — that State, I say, does not, on this account, cease to rank among the sovereigns who acknowledge no other law than that of nations."

So tributary States, and even feudatory States, may be sovereign. (Vattel, sec. 7.)

In the case of Worcester *v.* Georgia, 6 Peters, 539, the appellant was indicted under the State law for residing within the limits of the Cherokee Nation without a license, and without having taken the oath of allegiance to the State of Georgia. The plea, which was to the jurisdiction, after reciting the treaties, averred that thereby "the United States acknowledged the Cherokee Nation to be a sovereign nation, authorized to govern themselves and all persons who have settted in their territory," &c. This plea was sustained by the Supreme Court, in an elaborate opinion by Chief Justice Marshall, and a concurring one by Justices McLean and Washington, wherein the independence and sovereignty of the Cherokee Nation is fully sustained; and although the Cherokees were within the territorial limits of the State

of Georgia, the laws of that State were held not to operate in the domain of the Cherokee Nation. Justice Washington, in his concurring opinion, on page 262, says:

"In the executive, legislative, and judicial branches of our government we have admitted, by the most solemn sanction, the existence of the Indians as a separate and distinct people, and as being vested with rights which constitute them a STATE or separate community."

In the late case of Eastern Band of Cherokees *v.* The Cherokee Nation, 117 U. S., 308, the Supreme Court again asserted the sovereignty of the Cherokee Nation.

In the case of Mackey *v.* Cox, 18 Howard, 100, an administrator appointed by the Cherokee courts was held to be the proper party to whom an administrator, by ancillary appointment in the courts of the District of Columbia, should account.

In Whitsett *v.* Forehand, 79 N. C., 232, the Supreme Court of North Carolina held that a deed conveying land in that State was properly acknowledged when acknowledged before a judge of a court of the Cherokee Nation, whose official character was certified by the Chief of the Cherokee Nation.

The language in Mackey *v.* Cox, means what the syllabus states it to be, *i. e.*, "The Cherokee Nation are so far under the protection of the laws of the United States that they may be considered, for the purposes abovenamed, as a State or Territory of the United States."

A careful comparison of the character of the Cherokee Nation with that of the States of the Union will show that the complainant has surrendered to the United States about the same rights only that the States have, and we insist that it is a fair test of the power of the United States to make this grant to the defendant, through the Cherokee Nation, to ascertain whether such a grant could be made in a State.

The Cherokees have the unlimited power of self-government. They might establish an hereditary kingly government in their midst, while a State's power of self-government is limited to a Republic. The Cherokees can make no treaty with a foreign Government, neither can a State. A State cannot coin money, emit bills of credit, pass *expost facto* laws, or laws impairing the obligation of contracts. No such prohibitions apply to the Cherokee Nation.

The courts of the Cherokee Nation are supreme in their sphere, and there are no greater restrictions upon their jurisdiction than there are upon those of the State courts. The jurisdiction of the Federal courts affect as much, although not in the same classes of cases, the jurisdiction of the State courts as it does the Cherokee courts. The States are under the protection of the United States, as to foreign invasion and as to domestic insurrection. A republican form of government is guaranteed to them. They cannot declare war, nor can they pass laws in violation of the Constitution, laws or treaties of the United States, even to bind one of their own citizens; yet who would claim that one of the States of the Union was not a soverign State, or that the right of eminent domain did not vest therein?

The cases cited *supra* to show the character of complainant, were decided during that period of the history of the Nation when the Nation existed in the State of Georgia, upon a territory that the United States conceded to them a posessory title only, a title of occupancy, with the ultimate domain resting in the United States or the State within whose boundaries they were.

The territory now occupied by this Nation is held by no such limited title. The Nation holds the title to, as well as the jurisdiction over, the country. Letters-patent as well as treaty stipulations guarantee to the complainant the full and complete ownership of their territory,

and a full and valuable consideration has been paid to the United States therefor.

The several treaties between the United States and this Nation, ceding to it the country now sought to be invaded by the defendant, all contain in the most solemn form the plighted faith of the United States to guarantee the Nation its free and unembarrassed possession and enjoyment.

Beginning with the FIFTH TREATY OF WASHINGTON OF TREATY OF 1828 (7 Stats., 311), the recital of that treaty declares it to be "a permanent home, and which shall, under 'THE MOST SOLEMN GUARANTEE OF THE UNITED STATES, BE AND REMAIN THEIRS FOREVER—a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction, of a Territory or a State, nor be pressed upon by the extension, in any way, of any of the limits of any existing Territory or State."

ARTICLE II. "The United States agree to possess the Cherokees, and to guarantee it to them FOREVER, and that GUARANTEE IS HEREBY SOLEMNLY PLEDGED, of seven million acres of land, bounded as follows: * * * The United States further guarantee to the Cherokee Nation a perpetual outlet west, and a FREE and UNMOLESTED use of all the country lying west of the western boundary of the above-described limits," &c.

ARTICLE VII provides that the complainant, "for and in consideration of the foregoing stipulations and provisions," does hereby give up and surrender to the United States "all the land to which they are entitled in Arkansas," which lands were exchanged by them with the United States for lands that they formerly owned in Georgia and other States east of the Mississippi river.

ARTICLE VIII. "The Cherokee Nation having * * * secured to themselves and their posterity, under the solemn sanction of the guarantee of the United States,

* * * a large extent of unembarrassed country," &c., invite their brothers east of the Mississippi to join them.

The TREATY OF FORT GIBSON (7 Stats., 414), 1833, renews in terms the same guarantees above recited in the treaty of 1828.

The TREATY OF NEW ECHOTA (7 Stats., 478), 1835, in its preamble, recites the difficulties of the Nation residing within the limits of a State, and proceeds thus:

"And with a view of reuniting their people in one body, and securing a permanent home for themselves and their posterity in the country selected by their forefathers, without the territorial limits of State sovereignty, and *where they can establish and enjoy a* GOVERNMENT OF THEIR CHOICE and perpetuate such a state of society as may be most consonant with their views, habits, and conditions, and as may tend to their individual comfort and their advancement in civilization."

Article II recites the boundary of the lands that "the United States guaranteed and secured to be conveyed by patent to the Cherokee Nation of Indians," and in consideration of $500,000 "hereby covenant and agree to convey to the said Indians and their descendants, by patent in fee-simple, the following additional tract," &c.

ARTICLE V. "The United States hereby *covenant and agree* that the lands CEDED to the Cherokee Nation in the foregoing article shall at no future time, without their consent, be included within the territorial limits or jurisdiction of any State or Territory. But they shall secure to the Cherokee Nation the right, by their national councils, to make and carry in effect all such laws as they may deem necessary for the government of the persons and property within their own country, belonging to their people or such persons as have connected themselves with them."

The TREATY OF WASHINGTON OF 1846, (9 Stats., 1871,) Article I, provides "that the lands now occupied by the Cherokee Nation shall be *secured* to the whole

Cherokee people for their common use and benefit, and a patent shall be issued for the same," &c., to assure the tribe or Nation * * * that the United States will forever *secure and guarantee* to them and their heirs the country so exchanged with them," &c.

The TREATY OF WASHINGTON OF 1866 (14 Stats., 799):

Article 16, after providing for settling friendly Indians west of the ninety-sixth degree on purchase of land, provides:

"The Cherokee Nation to retain the right of possession of, and JURISDICTION OVER, all of said country west of ninety-sixth degree of longitude until thus sold and occupied, after which their jurisdiction and right of possession to terminate forever as to each of said districts thus sold and occupied."

ARTICLE XXVI. "The United States guarantee to the people of the Cherokee Nation the quiet and peaceable possession of their country," &c.

Article XXXI affirms in force all provisions of prior treaties.

The title to the territory thus purchased from and ceded by the United States to the Cherokees came before the Supreme Court in the case of Holden *v.* Joy, 17 wall., 211, and it was there held to be an absolute fee-simple title; that it was properly sold by treaty, and the complainant was competent to take as owners in fee-simple thereunder.

SECOND.—*Right of Eminent Domain.*

We have, then, an organized State with territorial boundaries, owning the absolute title of the soil, exercising the right of self-government, with an executive, legislative, and judicial department. Where, then, does the right of eminent domain reside in that country?

In Kohl *v.* The United States, 91 U. S., 371, the Court says:

"No one doubts the existence in the State governments of the right of eminent domain."

In Pollard *v.* Hagan, 3 Howard, 212, the Court says:

"On the admission of a new State, the right of eminent domain temporarily held by the United States passes to the State."

See also—

Doe *v.* Beebe, 13 How., 25.
Goodtitle *v.* Kibbee, 9 How., 471.
Weber *v.* Harbor Comm'r, 18 Wall., 57.

Judge Cooley, in his work on Constitutional Limitations (526), says:

"As under the peculiar American system, the protection and regulations of private rights, privileges, and immunities in general properly pertain to the State governments, and those governments are expected to make provision for those conveniences and necessities which are usually provided for their citizens, through the exercise of the right of eminent domain, the *right itself, it would seem, must pertain to those governments also, rather than to the government* of the Nation, and such has been the conclusion of the authorities."

If, then, the power of eminent domain resides in a State whose restrictions are greater than those of the Cherokee Nation, certainly that power must vest in that Nation. Indeed, it can hardly be seriously questioned that the National Council of the Nation, under its Constitution, might not exercise it. By the 1st Article of the treaty of 1819, the charter from the Cherokee Nation to the "Unicoy Turnpike Company" was to be respected, although it was in a country which, by that treaty, was relinquished to the United States, showing that, as early as that date, grants had been made by the Nation to private parties; and the provision in other

articles of other treaties in regard to "ferries," indicate that other franchises had been granted.

Until the last few years, it had been the universal practice of the Government to exercise the right of eminent domain through the agencies of the several States. It was not claimed before the case of Kohl *v.* The United States, *supra*, that for any purpose the Federal Government could exercise it in its own behalf. That case goes to the *extent and no more*, that for GOVERNMENTAL PURPOSES, the power of eminent domain resides in the National Government; that is, in the performance of its functions and perpetuating its existence. While it might take property for the absolute use of the Government itself, without the intervention of a State, the most ardent advocate of centralized power in the Federal Government would hardly contend that this would enable the Federal Government to authorize a corporation of one State to condemn property in another in order that such corporation might transact its own private business there.

The running of the Southern Kansas Railway Company through the Cherokee Nation is in no way exercising the functions of the Federal Government in that territory; and although a railroad may be a *quasi*-public corporation, this grant is for the private gain and advantage alone of the defendant.

THIRD.—*Effect of Treaties.*

If, then, the United States has not the right of eminent domain for the purposes of this act, let us inquire how far a treaty may be changed, annulled or repealed by an act of Congress.

The defendant urges that the grant in question is not prohibited by the treaties. If such an exercise of power is in consonance with the spirit or letter of the treaties hereinbefore recited, the English language must be powerless to express ideas. From the treaty of 1798 down to 1866,

whenever a right of way was desired over the Cherokee country it was provided for by treaty. Such provisions are found in the treaties of October, 1798; April, 1806; June, 1806; May, 1828, and 1866. In the language of Justice Washington, in Worcester *v.* Georgia (6 Pet., 583): "*Except by compact we have not even claimed a* RIGHT OF WAY through the Indian lands. For more than a century the United States has never pretended that it had any right to make such a grant as the one in question, and by its solemn treaties has sought from time to time to acquire these rights from the Cherokee Nation As late as the treaty of 1866 this was conceded.

Not only were these concessions sought for and acquired by treaty, but Congress, up to the date of the present act, always conceded that in dealing with the property rights of the Cherokees, their consent must be obtained to the proposed legislation. Thus, the act of May 11, 1872 (17 Stats., 98), in relation to sales of lands in Kansas, provides, in section 5, that no sale shall take place "until the provisions of this act are accepted by the Cherokee National Council."

The act of February 28, 1877 (19 Stats., 265), upon the same subject, in section 3, provides: "This act shall take effect and be in force from the date of its acceptance by the legislature of the Cherokee Nation."

And other acts contain similar provisions, requiring the consent of the Cherokees before the acts took effect.

If, as is contended, the treaties of the United States are to be the supreme law of the land, with the same effect only as acts of Congress, and subject to repeal in the same manner, then we insist that they are to be treated at least with equal force and effect, and what is found in them which would be irrepealable in a law must be irrepealable in a treaty. Congress cannot impair the obligation of a contract, where rights have vested, any more than the States can.

In the Sinking Fund Cases, 99 U. S., 719, the Court says: "The United States cannot, any more than a State, interfere with private rights, except for legitimate governmental purposes. * * * They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad; neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds *otherwise than according to the terms of the contract already made in that connection.* THE UNITED STATES ARE AS MUCH BOUND BY THEIR CONTRACTS AS INDIVIDUALS. If they repudiate their obligations it is as much repudiation, with all the wrong and reproach that term implies, as would be if the repudiator had been a State, municipality, or a citizen. NO CHANGE CAN BE MADE IN THE TITLE CREATED BY THE GRANT OF THE LANDS, OR IN THE CONTRACT FOR THE SUBSIDY BONDS, WITHOUT THE CONSENT OF THE CORPORATION. ALL THIS IS INDISPUTABLE." And in the same case, in the dissenting opinion of Justice Strong, on page 736, this doctrine, which was the unanimous opinion of the Court, is stated thus: "Now, where is the power of Congress to add new terms to any contract made with the United States, or made between any two private individuals? WHERE IS THE POWER TO ANNUL VESTED RIGHTS? It is certainly not to be found in the Constitution. True, the provision that no State shall pass any law impairing the obligations of contracts applies only to State legislation. For such legislation the prohibition was necessary; for State Legislatures have all legislative powers which is not expressly denied to them. But no necessity existed for imposing such a limitation on the power of Congress. As Mr. Hamilton says, in the 84th number of the Federalist, 'Why declare that things shall not be done which there is no power to do'? * * * I search in vain for any ex-

press or implied grant of power to add new terms to any existing contracts made by or with the Government, or any grant of power to destroy vested rights. * * * And not only is such legislative authority not conferred upon Congress by the Constitution, but it is, in effect, expressly denied." It may be remarked that in that case Congress had, in the charter to the railroad company, expressly reserved to itself the right to alter and amend it; but even with that reserved right the Court held it had no power to alter the contract. In that case the only consideration for the grant was the subsequent building of the railroad, while here a *valuable consideration* passed to the United States from the complainant.

In the case of the Eastern Band of Cherokees *v.* The Cherokee Nation, 20 Court of Claims, 481, (affirmed on appeal, 117 U. S., 288,) the Chief Justice says: "The Cherokee Nation has a right to stand upon the contracts of its treaties in relation to the funds now in question, and *no acts of Congress*, and no proceedings of the political departments of the Government in connection therewith, can take away its *vested rights guaranteed* by such treaties."

In Holden *v.* Joy, *supra*, p. 247, the Court says:

"There are many authorities where it is held that a treaty may convey to a grantee a good title to such lands without an act of Congress conferring it, *and that Congress has no constitutional power to settle or interfere with rights under treaties except in cases purely political.*"

In Wilson *v.* Wall, 6 Wall., 89, in discussing the power of Congress to construe a treaty, the Court says:

"Congress has no constitutional power to settle the rights under treaties except in cases purely political."

To the same effect are—

Insurance Co. *v.* Canter, 1 Peters, 542.
Doe *v.* Wilson, 23 Howard, 460.
The Kansas Indians, 5 Wallace, 737.

Foster *v.* Neilson, 2 Peters, 254.
Crews *v.* Burcham, 1 Black, 356.
Blair *v.* Pathkiller, 2 Yerger, 407.
Harris *v.* Barnett, 4 Blackford, 369.

The Cherokee Tobacco Case, in 11 Wallace, has been limited by the Supreme Court in the case of United States *v.* Forty-three Gallons of Whisky, 108 U. S., 491, to that particular case, in the following language:

"The case of the Cherokee Tobacco Tax, 11 Wall., 616, cannot be treated as authority against the conclusions we have reached. The *decision only disposed of that case*, as three of the judges of the Court did not sit in it, and two dissented from the judgment pronounced by the other four."

In the HEAD MONEY CASES, 112 U. S., 597, the Court held that the treaty obligations were not infringed by the act under examination.

Giving all the force that can be claimed for them by the defendant to these cases, they do not invade the doctrine that the *vested rights* secured by treaty cannot be abridged or curtailed by subsequent legislation. The defendant is in error in his citation of the provisions of the treaty of 1846. The part cited is a recital in that treaty of the act of 1830. The patent had issued in 1839 to the Cherokee Nation, seven years before the date of this treaty; and in the case of Holden *v.* Joy, *supra*, touching this condition, the Court says, on page 250:

"Strong doubts are entertained whether the condition in the patent is valid, as it was not authorized by the treaty under which it was issued. By the treaty, the United States covenanted and agreed to convey the lands in fee-simple title, and it may well be held that if that condition reduces the estate conveyed to less than a fee, it is void."

The title, then, being in the Cherokee Nation, the defendant took nothing by its grant of a right of way in

the second section of the act. The United States had no land in the Cherokee Nation to grant. It would be an attempt by act of Congress to take the property of one person and give it to another. This would not be a law; it would be a decree. The right to declare it would not be a legislative power, and such a law would be void. This section does not pretend to give the company the right to acquire a right of way, but purports to grant the right of way absolutely over property that the United States did not own.

FOURTH.—*Contention of the Defendant.*

But it has been contended that this act may be good under the power of Congress to *establish* post roads or to regulate interstate commerce or commerce with Indian tribes.

A sufficient answer to these contentions ought to be that the act in question does not pretend to do either. The line of the road is not declared to be a post road, and the 7th section especially makes the residence on the right of way subject to the provision of the Indian intercourse laws, thus clearly indicating that the act in question is not of that class of laws. The title of the act is, "An Act to Grant the Right of Way through the Indian Territory to the Southern Kansas Railway Company," &c. If the act was one establishing a post road or regulating commerce with an Indian tribe, we ought certainly to find something in the act on those subjects; but it is nothing more than the authorization of a foreign corporation to enter the Indian Territory for its private gain and the transaction of its private business therein.

The grant of power in the Constitution to "establish" post roads has been held by eminent jurists and statesmen to authorize Congress to designate only, roads over which

the United States mail was to be carried. Such were the views of President Monroe, as expressed in his veto message of May 4, 1822; and Mr. Justice McLean, in the Wheeling Bridge case, 18 Howard, 441, says: "Even an ordinary road, though a post road, may be altered or vacated at the will of the local authority." President Madison, in several veto messages, in 1817, affirmed this limitation, as well as President Jackson in his veto of May 27, 1830. See also 4 Elliot's Debates, 279. The argument in favor of this construction is given by Judge Story in his work on the Constitution, section 1129, volume 2, and so much of it as relates to the uniform construction put upon it up to that time for "twenty years," is reinforced by the subsequent uniform legislation of Congress for now one hundred years; for during all the period from the adoption of the Constitution to the present day Congress has never exercised or pretended to have other power, under that clause of the Constitution, than the designation of roads as post roads. There are no post roads belonging to the United States in the States. The roads upon which the mails are carried belong either to the States, corporations, or individuals, and are declared post roads only to protect the carrier from being interfered with, and the mails from being delayed in their transportation, and the postal service from fraud.

Nor can the case of Pensacola Telegraph Company *v.* Western Union Co., 96 U. S., be held to affirm a greater right than this, for the Chief Justice, in delivering the opinion, expressly says, after referring to the statute of Florida authorizing foreign corporations to come into the State (page 13), "but we are clearly of opinion that, with such action *and a right of way secured by private arrangement with the owner of the land*, this corporation cannot be excluded by the *present complainant*."

THIRD ASSIGNMENT OF ERROR.

If the contention of the complainant hereinbefore set forth is sustained, there can be no doubt of the power of the Court to grant the injunction prayed; but, aside from this, the Court would have jurisdiction to award an injunction, because the compensation has not been made, and until this is done the defendant may be enjoined from entering upon the territory of the complainant.

In a case of this kind compensation must *precede appropriation*. We are not unmindful of the authorities that hold that were the State itself, or even a municipality, takes property the constitutional guarantee has been held to be fulfilled if *provision* is made for compensation that is sure, for the State is considered a sufficient guarantor; but where the property is taken by a corporation, which may be solvent or insolvent, the authorities are to the effect that compensation must first be made.

Loweree *v.* City of Newark, 38 N. J. Law, 151.
White *v.* Nashville R. R., 7 Heisk., (Tenn.,) 518.
United States *v.* Reed, 56 Mo., 565.
Paris *v.* Mason, 37 Texas, 447.
Mills on Eminent Domain—title, Compensation.

The exercise of the right of eminent domain, when it exists, must be exercised in subordination to the constitutional guarantee that no person shall be deprived of his property without due process of law.

Mills on Eminent Domain.

So much of the act in question as undertakes to fix an arbitrary price for the land, or that authorizes the appraisal of it by appraisers appointed by Executive authority, is an attempt to deprive the complainant of its property without "due process of law," and cannot give any right to the defendant. Nothing less than the

exercise of the judicial power, and by proceedings where parties can be heard, can persons be deprived of their property. This alone is due process of law.

The act of the defendant in depositing twice the amount of the award in the registry of the court is a guarantee to that extent; but where is there any security for any further sum that may be awarded? The company may be solvent or insolvent at the termination of these proceedings; its property may be mortgaged, so that any recovery from it would be impossible, and a naked judgment is not compensation.

Fourth Assignment of Error.

Regarding the bill as seeking the alternative relief of compensation, there seems to be no good reason why the Court should not take cognizance of it.

The proceedings in condemnation are not actions at law any more than suits in equity. A court of law would have no general jurisdiction to entertain such a suit. They are special proceedings, and there is no reason why the power may not as well be exercised by a court of equity as one of law. The preservation of trial by jury would be essential to the validity of the condemnation proceedings if it was necessarily a common law proceeding, but this has frequently been held not to be necessary.

The act in question is peculiar in its language. It simply provides for "an appeal by original petition to the courts," without giving any direction as to how the case shall be there disposed of, whether by the appointment of appraisers, or trial by jury or otherwise. It is an appellate proceeding, and, as the statute does not fix the particular court into which the appeal shall be returned, it left with the party appealing, the right to select the court.

Filed with the bill are the proceedings in the Interior

Department, from which, as alternative relief, the bill is prayed to be treated as an original petition in appeal.

The bill seeks alternative relief, and we contend that it is well settled that a bill may be filed with a double aspect. In proceedings of this character it has been frequently held that a property owner might contest the question as to whether the taking was for a public use, and so within the power of eminent domain, and in the alternative seek compensation.

Matter of Deanville Cemetery, 66 N. Y., 569.
Hanson *v.* Vernon, 27 Iowa, 28.
Talbot *v.* Hudson, 16 Gray, 417.
Freight Co. *v.* Memphis, 4 Coldw., 419.

The authority for this prayer for alternative relief, however, is fully sanctioned by the Supreme Court in Hardin *v.* Boyd, 113 U. S., 757. In that case a bill sought to set aside a conveyance of lands and, as alternative relief, the payment of the purchase-money. This was held good, and in that case the case relied on by defendant of Shields *v.* Barron, is explained. This case seeks, substantially, the cancellation of the title of the defendant, and, in the alternative, payment of the purchase-money.

The decree below should be reversed, and a decree directing the awarding of the injunction as prayed for in the bill, or, in the alternative, the bill should be retained and due proceedings directed to be had to fix the compensation for the lands taken by the appellee.

J. E. McDonald,
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John C. Fay,
Attorneys for Appellant.

APPENDIX.

PATENT TO CHEROKEE NATION.

The United States of America to all to whom these presents shall come, greeting:

WHEREAS by certain treaties made by the United States of America with the Cherokee Nation of Indians of the 6th of May, 1828, the 14th of February, 1833, and the 29th of December, 1835, it was stipulated and agreed on the part of the United States that in consideration of the premises mentioned in the said treaties, respectfully, the United States should guaranty, secure, and convey, by patent, to the said Cherokee Nation, certain tracts of land, the description of which tracts and the terms and conditions on which they were to be conveyed are set forth in the second and third articles of the treaty of the 29th of December, 1835, in the words following, that is to say:

"ARTICLE 2. *Whereas* by the treaty of May 6, 1828, and the supplementary treaty thereto of February 14, 1833, with the Cherokees west of the Mississippi, the United States guarantied and secured, to be conveyed by patent to the Cherokee Nation of Indians, the following tract of country: Beginning at a point on the old western Territorial line of Arkansas Territory, being 25 miles north from the point where the Territorial line crosses Arkansas River; thence running from said north point, south on the said Territorial line, where the said Territorial line crosses Verdigris River; thence down said Verdigris River to the Arkansas; thence down said Arkansas to a point where a stone is placed opposite the east or lower bank of Grand River, at its junction with the Arkansas; thence running south 44 degrees 1 mile; thence in a straight line to a point 4 miles northerly from the mouth of the north fork of the Canadian; thence along the said 4-mile line to the Canadian; thence down the Canadian to the Arkansas; thence down the Arkansas to that point on the Arkansas

where the eastern Choctaw boundary strikes said river and running thence with the western line of Arkansas Territory as now defined to the southwest corner of Missouri; thence along the western Missouri line to the line assigned the Senecas; thence on the south line of the Senecas to Grand River; thence up said Grand River as far as the south line of the Osage reservation, extended, if necessary; thence up and between said south Osage line, extended west if necessary, and a line drawn due west from the point of beginning to a certain distance west, at which a line running north and south from said Osage line to said due west line will make 7,000,000 acres within the whole described boundaries.

"In addition to the 7,000,000 acres of land thus provided for and bounded, the United States further guaranty to the Cherokee Nation a perpetual outlet west, and a free and unmolested use of all the country west of the western boundary of said 7,000,000 acres, as far west as the sovereignty of the United States and their right of soil extend: *Provided, however*, That if the saline or salt plain on the western prairie shall fall within said limits prescribed for said outlet the right is reserved to the United States to permit other tribes of red men to get salt on said plain in common with the Cherokees. And letters patent shall be issued by the United States, as soon as practicable, for the land hereby guarantied. And whereas it is apprehended by the Cherokees that in the above cession there is not contained a sufficient quantity of land for the accommodation of the whole nation on their removal west of the Mississippi, the United States, in consideration of the sum of $500,000, therefore, hereby covenant and agree to convey to the said Indians and their descendants by patent, in fee-simple, the following additional tract of land situated between the west line of the State of Missouri and the Osage reservation, beginning at the southeast corner of the same, and runs north along the east line of the Osage lands 50 miles to the northeast corner thereof; and thence east to the west line of the State of Missouri; thence with said line south 50 miles; thence west to the place of beginning; estimated to contain 800,000 acres of land; but it is expressly understood that if any of the lands assigned the Quapaws shall fall within the aforesaid bounds the same shall be

reserved and excepted out of the lands above granted and a pro rata reduction shall be made in the price to be allowed to the United States for the same by the Cherokees.

"ARTICLE 3. The United States also agree that the lands above ceded by the treaty of February 14, 1883, including the Outlet, and those ceded by this treaty, shall all be included in one patent, executed to the Cherokee Nation of Indians by the President of the United States according to the provisions of the act of May 28, 1830. It is, however, agreed that the military reservation at Fort Gibson shall be held by the United States. But should the United States abandon said post, and have no further use for the same, it shall revert to the Cherokee Nation. The United States shall always have the right to make and establish such posts and military roads and forts in any part of the Cherokee country as they may deem proper for the interest and protection of the same, and the free use of as much land, timber, fuel, and materials of all kinds, for the construction and support of the same, as may be necessary: *Provided*, That if the private rights of individuals are interfered with, a just compensation therefor shall be made."

And whereas the United States have caused the said tract of 7,000,000 acres, together with the said perpetual Outlet, to be surveyed in one tract, the boundaries whereof are as follows:

Beginning at a mound of rocks 4 feet square at base and 4½ feet high, from which another mound of rocks bears south 1 chain, and another mound of rocks bears west 1 chain, on what has been denominated the old western territorial line of Arkansas Territory, 25 miles north of Arkansas River; thence south 21 miles and 28 chains to a post on the northeast bank of the Verdigris River, from which a hackberry, 15 inches in diameter, bears south 61 degrees 31 minutes east 43 links, marked C. H. L., and a cottonwood, 42 inches diameter, bears south 21 degrees 15 minutes east 50 links, marked C. R. K. L.; thence down the Verdigris River on the northeast bank, with its meanders, to the junction of Verdigris and Arkansas Rivers; thence from the lower bank of Verdigris River, on the north bank of Arkansas River, south 44 degrees 13 minutes east 57 chains to a post on the

south bank of Arkansas opposite the eastern bank of Neosho River at its junction with Arkansas, from which a red oak, 36 inches diameter, bears south 76 degrees 45 minutes west 24 links, and a hickory, 24 inches diameter, bears south 89 degrees east 4 links; thence south 53 degrees west 1 mile to a post, from which a rock bears north 53 degrees east 50 links, and a rock bears south 18 degrees 18 minutes west 50 links; thence south 18 degrees 18 minutes west 33 miles 28 chains and 80 links to a rock, from which another rock bears north 18 degrees 18 minutes east 50 links, and another rock bears south 50 links; thence south 4 miles to a post on the lower bank of the north fork of the Canadian River at its junction with Canadian River, from which a cottonwood, 24 inches diameter, bears north 18 degrees east 40 links, and a cottonwood, 15 inches diameter, bears south 9 degrees east 14 links, thence down the Canadian River on its north bank to its junction with Arkansas River; thence down the main channel of Arkansas River to the western boundary of the State of Arkansas, at the northern extremity of the eastern boundary of the lands of the Choctaws, on the south branch of the Arkansas River, 4 chains and 54 links east of Fort Smith; thence north 7 degrees 25 minutes west, with the western boundary of the State of Arkansas, 76 miles 64 chains and 50 links to the southwest corner of the State of Missouri; thence north on the western boundary of the State of Missouri, 8 miles 49 chains and 50 links to the north bank of Cowskin, or Seneca River, at a mound 6 feet square at base and 5 feet high, in which is a post marked on the south side, cor. n. ch. L. d; thence west on the southern boundary of the lands of the Senecas, 11 miles and 48 chains, to a post on the east bank of the Neosho River, from which a maple, 18 inches in diameter, bears south 31 degrees east 72 links; thence up Neosho River, with its meanders, on the east bank, to the southern boundary of Osage lands, 36 chains and 50 links west of the southeast corner of the lands of the Osages, witnessed by a mound of rocks on the west bank of Neosho River; thence west on the southern boundary of the Osage lands to the line dividing the territory of the United States from that of Mexico, 288 miles 13 chains and 66 links, to a mound of earth 6 feet square at base and 5½ feet

high, in which is deposited a cylinder of charcoal 12 inches long and 4 inches diameter; thence south along the line of the territory of the United States and of Mexico, 60 miles and 12 chains to a mound of earth 6 feet square at base and 5½ feet high, in which is deposited a cylinder of charcoal 18 inches long and 3 inches diameter; thence east along the northern boundary of Creek lands 273 miles 55 chains and 66 links to the beginning, containing within the survey 13,574,135 acres and .14 of an acre.

And whereas the United States have also caused the said tract of 800,000 acres to be surveyed, and have ascertained the boundaries thereof to be as follows: Beginning at southeast corner of Osage lands described by a rock from which a red oak 20 inches diameter bears south 27 degrees east 76 links, and a burr oak 30 inches diameter bears south 59 degrees west 1 chain and another a burr oak 30 inches diameter bears north 8 degrees west 1 chain and 37 links; and another burr oak 40 inches diameter bears north 30 degrees west 1 chain and 81 links, and running east 25 miles to a rock on the western line of the State of Missouri, from which a post oak 10 inches diameter bears north 48 degrees 30 minutes east 4 chains; and a post oak 12 inches diameter bears south 62 degrees east 5 chains; thence north with the western boundary of the State of Missouri 50 miles to a mound of earth 5 feet square at base and 4½ feet high; thence west 25 miles to the northeast corner of the lands of the Osages, described by a mound of earth 6 feet square at the base and 5 feet high; thence south along the eastern boundary of Osage lands 50 miles to the beginning, containing 800,000 acres.

Therefore, in execution of the agreement and stipulations contained in the said several treaties, the United States have given and granted, and by these presents do give and grant unto the said Cherokee Nation the two tracts of land so surveyed and hereinbefore described, containing in the whole 14,374,135.14 acres: To have and to hold the same, together with all the rights, privileges, and appurtenances thereunto belonging, to the said Cherokee Nation forever; subject, however, to the right of the United States to permit other tribes of red men to get salt on the salt plain, on the western prairie,

referred to in the second article of the treaty of the 29th of December, 1835, which salt plain has been ascertained to be within the limits prescribed for the outlet agreed to be granted by said article; and subject also to all the other rights reserved to the United States in and by the articles hereinbefore recited, to the extent and in the manner in which the said rights are so reserved; and subject also to the condition provided by the act of Congress of the 28th of May, 1830, referred to in the above-recited third article, and which condition is that the lands hereby granted shall revert to the United States if the said Cherokee Nation becomes extinct or abandons the same.

In testimony whereof, I, Martin Van Buren, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the 31st day of December, in the year of our Lord 1838, and of the Independence of the United States the sixty-third.

[L. S.] M. VAN BUREN.

By the President:

H. M. GARLAND,
Recorder of the General Land Office.

ACT GRANTING RIGHT OF WAY TO SOUTHERN KANSAS RAILWAY.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Southern Kansas Railway Company, a corporation created under and by virtue of the laws of the State of Kansas, be, and the same is hereby, invested and empowered with the right of locating, constructing, owning, equipping, operating, using, and maintaining a railway and telegraph and telephone line through the Indian Territory, beginning at a point on the northern line of said Territory where an extension of the Southern Kansas Railway from Winfield in a southerly direction would strike said line, running thence south in the direction of Dennison in the State of Texas, on the most practicable route, to a point at of near where the Washita

River empties into the Red River, with a branch constructed from a point at or near where said main line crosses the northern line of said Territory, westwardly along or near the northern line of said Territory, to a point at or near where Medicine Lodge Creek crosses the northern line of said Territory, and from that point in a southwesterly direction, crossing Beaver Creek at or near Camp Supply, and reaching the west line of said Indian Territory at or near where Wolf Creek crosses the same, with the right to construct, use, and maintain such tracks, turnouts and sidings as said company may deem it to their interest to construct along and upon the right of way and depot grounds hereby granted.

SEC. 2. That a right of way one hundred feet in width through said Indian Territory is hereby granted for said main line and branch to the Southern Kansas Railway Company, and a strip of land two hundred feet in width with a length of three thousand feet in addition to right of way, is granted for stations for every ten miles of road, no portion of which shall be sold or leased by the company, with the right to use such additional ground where there are heavy cuts or fills as may be necessary for the construction and maintenance of the road-bed not exceeding one hundred feet in width on each side of said right of way, or as much thereof as may be included in said cut or fill: *Provided*, That no more than said addition of land shall be taken for any one station: *Provided further*, that no part of the lands herein granted shall be used except in such manner and for such purposes only as shall be necessary for the construction and convenient operation of said railroad, telegraph, and telephone lines, and when any portion thereof shall cease to be so used such portion shall revert to the nation or tribe of Indians from which the same shall have been taken.

SEC. 3. That before said railway shall be constructed through any lands held by individual occupants, according to the laws, customs, and usages of any of the Indian nations or tribes through which it may be constructed, full compensation shall be made to such occupants for all property to be taken or damage done by reason of the construction of such railway. In case of failure to make amicable settlement with any occupant,

such compensation shall be determined by the appraisement of three disinterested referees, to be appointed by the President, who, before entering upon the duties of their appointment, shall take and subscribe, before competent authority, an oath that they will faithfully and impartially discharge the duties of their appointment, which oath, duly certified, shall be returned with their award. In case the referees cannot agree, then any two of them are authorized to make the award. Either party being dissatisfied with the finding of the referees, shall have the right, within ninety days after the making of the award and notice of the same, to appeal by original petition to the Courts, where the case shall be tried *de novo*. When proceedings have been commenced in Court, the railway company shall pay double the amount of the award into Court to abide the judgment thereof, and then have the right to enter upon the property sought to be condemned, and proceed with the construction of the railroad. Each of said referees shall receive for their services the sum of four dollars per day for each day they are engaged in the trial of any case submitted to them under this act, with mileage at five cents per mile. Witnesses shall receive the usual fees allowed by the Courts of said nations, costs, including compensation of the referees, shall be made a part of the award, and be paid by such railroad company.

SEC. 4. That said railroad company shall not charge the inhabitants of said Territory a greater rate of freight than the rate authorized by the laws of the State of Kansas for services or transportation of the same kind: *Provided*, That passenger rates on said railway shall not exceed three cents per mile. Congress hereby reserves the right to regulate the charges for freight and passengers on said railway and messages on said telegraph and telephone lines, until a State government or governments shall exist in said Territory, within the limits of which said railway, or a part thereof, shall be located; and then such State government or governments shall be authorized to fix and regulate the cost of transportation of persons and freights within their respective limits by said railway; but Congress expressly reserves the right to fix and regulate at all times the cost of such transportation by said railway or said company when-

ever such transportation shall extend from one State into another, or shall extend into more than one State: *Provided, however*, That the rate of such transportation of passengers, local or interstate, shall not exceed the rate above expressed, *And provided further*, That said railway company shall carry the mail at such prices as Congress may by law provide: and until such rate is fixed by law the Postmaster-General may fix the rate of compensation.

SEC. 5. That said railway company shall pay to the Secretary of the Interior, for the benefit of the particular nations or tribes through whose lands said main line and branch may be located the sum of fifty dollars, in addition to compensation provided for in this act for property taken and damages done by the construction of the railway for each mile of railway that it may construct in said Territory, said payments to be made in installments of five hundred dollars as each ten miles of road is graded, Said company shall also pay, so long as said Territory is owned and occupied by the Indians, to the Secretary of the Interior the sum of fifteen dollars per annum for each mile of railway it shall construct in the said Territory. The money paid to the Secretary of the Interior under the provisions of this act shall be apportioned by him, in accordance with the laws and treaties now in force among the different nations and tribes according to the number of miles of railway that may be constructed by said railway company through their lands: *Provided*, That Congress shall have the right, so long as said lands are occupied and possessed by said nations and tribes, to impose such additional taxes upon said railroad as it may deem just and proper for their benefit: *Provided further*, That if the general counsel of either of the nations or tribes through whose lands said railway may be located shall within four months after the filing of maps of definite location, as set forth in section six of this act, dissent from the allowances provided for in this section, and shall certify the same to the Secretary of the Interior, then all compensation to be paid to such dissenting nation or tribe under the provisions of this act shall be determined as provided in section three for the determination of the compensation to be paid to the individual occupant of lands with the right

of appeal to the courts upon the same terms, conditions, and requirements as therein provided: *Provided further*, That the amount awarded or adjudged to be paid by said railway company for said dissenting nation or tribe shall be in lieu of the compensation that said nation or tribe would be entitled to receive under the provisions of this section, Nothing in this act shall be construed to prohibit Congress from imposing taxes upon said railway, nor any Territory or State hereafter formed through which said railway shall have been established from exercising the like power as to such part of said railway as may lie within its limits, Said railway company shall have the right to survey and locate its railway immediately after the passage of this act,

SEC. 6. That said company shall cause maps showing the route of its located lines through said Territory to be filed in the office of the Secretary of the Interior, and also to be filed in the office of the principal chief of each of the nations or tribes through whose lands said railway may be located; and after the filing of said maps no claim for a subsequent settlement and improvement upon the right of way shown by said maps shall be valid as against said company: *Provided*, That when a map showing any portion of said railway company's located line is filed as herein provided for, said company shall commence grading said located line within six months thereafter or such location shall be void and said location shall be approved by the Secretary of the Interior in sections of twenty five miles before construction of any such section shall be begun,

SEC. 7. The officers, servants and employes of said company necessary to the construction and management of said road shall be allowed to reside, while so engaged upon such right of way, but subject to the provisions of the Indian intercourse laws and such rules and regulations as may be established by the Secretary of the Interior in accordance with said intercourse laws.

SEC. 8. That the United States circuit and district courts for the northern district of Texas, the western district of Arkansas, and the district of Kansas, and such other courts as may be authorized by Congress, shall have, without reference to the amount in controversy, concurrent jurisdiction over all controversies arising be-

tween said Southern Kansas Railway Company and the nations and tribes through whose territory said railway shall be constructed, Said courts shall have like jurisdiction, without reference to the amount in controversy, over all controversies arising between the inhabitants of said nations or tribes and said railway company; and the civil jurisdiction of said courts is hereby extended within the limits of said Indian Territory, without distinction as to citizenship of the parties, so far as may be necessary to carry out the provisions of this act,

SEC. 9. That said railway company shall build at least one hundred miles of its railway in said Territory within three years after the passage of this act, or this grant shall be forfeited as to that portion not built, that said railroad company shall construct and maintain continually all road and highway crossings, and necessary bridges, over said railway whereever said roads and highways do now or may hereafter cross said railway's right of way, or may be by the proper authorities laid out across the same.

SEC. 10. That the said Southern Kansas Railway Company shall accept this right of way upon the expressed condition, binding upon itself, its successors and assigns, that they will neither aid, advise, nor assist in any effort looking towards the changing or extinguishing the present tenure of the Indians in their land, and will not attempt to secure from the Indian nations any further grant of land or its occupancy than is hereinbefore provided: *Provided*, That any violation of the condition mentioned in this section shall operate as a forfeiture of all the rights and privileges of said railway company under this act.

SEC. 11. All mortgages executed by said railway company conveying any portion of its railroad, with its franchises, that may be constructed in said Indian Territory, shall be recorded in the Department of the Interior, and the record thereof shall be evidence and notice of their execution, and shall convey all rights and property of said company as therein expressed.

SEC. 12. Congress may, at any time, amend, add to, alter or repeal this act.

Approved, July 4, 1884.

In the Supreme Court of the United States.

THE CHEROKEE NATION,
Appellant,

vs.

THE SOUTHERN KANSAS RAILWAY COMPANY.

STATEMENT.

This is a bill in Equity filed by the Cherokee Nation, against the appellee, with the primary object of restraining it from constructing its line of railway through the lands of the Cherokees. The bill also prays that if the injunction be refused, adequate damages may be awarded for the lands taken; in other words, if equitable relief be denied that the bill may be taken as an original petition in appeal from an award of damages in condemnation proceedings. (Record, page 4).

The rights of the appellee are asserted under and by virtue of an act of Congress, entitled "An act to grant the right of way through the Indian Territory to the Southern Kansas Railway Company, and for other purposes," approved July 4th, 1884 (23 U. S. Stats., 73).

This act authorizes the defendant company to construct, equip and operate railway, telegraph and telephone lines through the Indian Territory on a certain route therein described. It provides for the appointment of Referees by

the President to assess damages to individual owners and to tribes through whose lands the road might be located, and for an appeal in case of dissatisfaction from the award of the Referees. It also gives jurisdiction to the Circuit and District Courts for the Northern District of Texas, the Western District of Arkansas and the District of Kansas of all controversies between the company and individuals or tribes, without regard to the amount in controversy.

Other provisions are contained in the act which look to the control and regulation of the railway by the Government and by the government of any State, which shall in the future exist within the territory traversed by the road.

Statutes 1884, page 73.

The bill attacks the constitutionality of this statute, on the ground that its scope is beyond the power of the United States. The averments are briefly :

1. That complainant is a sovereign State, recognized as such by certain treaties mentioned in the bill, and that it exercises the powers, jurisdiction and functions of a sovereign State within the territory ceded to it under the treaty of February 14th, 1833. (Record, page 1).

2. That "by virtue of the inherent rights of sovereignty," as recognized by treaties between the United States and the Cherokee Nation, the right of eminent domain as well as other rights of sovereignty in the said territory "remains exclusively vested" in complainant. (Record, page 1).

3. That in addition to the cession of the territory by the several treaties, a patent in fee simple has been executed to the complainant by the United States. (Record, page 1).

4. That no jurisdiction or authority remained in the United States to grant such right of way through the territory of the Cherokees," nor did the right of eminent

domain"—to quote the exact language of the bill—"remain in the United States; but that by its treaties and patents aforesaid remained solely in your complainant, the Cherokee Nation."

5. The other averments of the bill set out the dissent of the complainant from the Act of Congress, its protest, the construction of the road by the defendant; the inadequacy of the award of the Referees, and the appeal of the complainant to the Court as provided in the act. (Record, pages 2 and 3).

The defendant demurred: First, for want of jurisdiction, second, for want of equity, and third, because the suit is one the attempts to join legal and equitable causes of action. And the demurrer was sustained and bill dismissed without prejudice. (Record, page 20).

ARGUMENT.

No question is raised by the bill as to the propriety of the *procedure* by which the power of eminent domain is to be exercised under the act. The appointment of Referees by the President, an award of damages by them, with an appeal to the Courts by either party if dissatisfied, are not denied to be proper steps to acquire lands, if the power exists. It is not for a failure to comply with the act that the defendant is complained of; but that the act itself is void, conferring no right of any kind, because the right of eminent domain over the lands in question is not in the United States, but in the Cherokee Nation of Indians.

We submit the following:

I.

The United States has the right of eminent domain throughout its entire geographical extent; and this right may be exercised, for all such purposes as properly belong to it, in any political division of the United States, and in any region or territory not politically organized.

The nature of the right of eminent domain has never been stated with more clearness than by this Court. It is "the right to take private property for public uses."

Boom Co. *vs.* Patterson, 98 U. S., 403.
United States *vs.* Jones, 109 U. S., 513.

Writers upon the philosophy of government have given more elaborate definitions of this great right; but they add nothing to the simple comprehensiveness of the language of Mr. Justice Field in the above cases. It appertains to every independent government. "It requires no constitutional recognition; it is an attribute of sovereignty."

Boom Co. *vs.* Patterson, *supra*.

No one now disputes the sovereignty of the United States as to all matters within its constitutional sphere. "True its sphere is limited. Certain subjects only are committed to it, but its power over those subjects is as full and complete as is the power of the States over the subjects to which their sovereignty extends."

Kohl *et al. vs.* United States, 91 U. S., 367.

Speaking of the right of eminent domain in the United States Government, Mr. Justice Strong in the case last above cited uses this language: "Such an authority is

essential to its independent existence and perpetuity. This can not be preserved if the obstinancy of a private person or if any other authority can prevent the acquisition of the means or instruments by which alone governmental functions can be performed. The powers vested by the Constitution in the General Government demand for their exercise the acquisition of lands in all the States. They are needed for forts, armories and arsenals, for navy yards and light houses, for custom houses, post-offices and court houses and other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property holders to sell, or by action of a State prohibiting a sale to the Federal Government, the constitutional grants of power may be rendered nugatory, and the Government is dependent for its practical existence upon the will of a State or even upon that of a private citizen. This can not be."

It would be an impertinence to consume time in discussing the proposition that the United States Government possesses the right of eminent domain, without let or hindrance, as to the matters confided to it by the Constitution. I pass therefore to this question whether that right may be exercised for the purpose of securing the construction of a railroad.

The Right of Eminent Domain may be Exercised for Railroads.

This Court has found in the constitutional grant to Congress of power to regulate commerce, and to establish post roads, ample authority to incorporate such railway companies as may be necessary to carry out this grant of power, and also to use State corporations as such instrumentalities by conferring the necessary franchises upon them. This flows from the doctrine which has been from the first asserted by the Court, that the grant of powers in the Eighth Section of the first Article of the Constitution, "to make all laws which shall be necessary and proper to carry into execution the foregoing powers,"

includes all appropriate means which are conducive or adapted to the end to be accomplished, and which in the judgment of Congress will most advantageously effect it (Mr. JUSTICE GRAY, in Legal Tender Cases, 110 U. S., 421).

And in *United States* vs. *Fisher*, 2 Cranch, 358, CHIEF JUSTICE MARSHALL, with that incomparable felicity of diction which characterized all his judgments, said:

"In construing this clause, it would be incorrect, and would produce endless difficulties if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. When various systems might be adopted for that purpose, it might be said with respect to each, that it was not necessary because the end might be obtained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution."

Acting upon this great principle of interpretation of constitutional power, Congress in 1862 devised a most comprehensive railway system designed to connect the Pacific States with those of the East through the instrumentality of a corporation created by itself, and also by several State corporations, to which numerous rights and privileges were granted. (12 Stats. at Large, 489). Since the passage of this act Congress has repeatedly asserted its power over the subject of commerce among the States by the passage of similar acts. Not commerce alone but postal facilities and military uses are embraced in and secured by them. The right of the Government to authorize private corporations to construct these great avenues of communication follows from its own right to construct them; *its right to have them.*

If it seems to the Government of the United States necessary or proper to have a railroad across the Indian Territory it clearly has the authority to see that the railroad is built. It may or may not build it itself, but its purpose

to have it, can not be frustrated by any mere question as to the choice of agencies. As was said by Mr. JUSTICE BRADLEY, at the Circuit, in the case of Stockton *vs.* Baltimore and N. Y. Railroad Co., 32 Federal Reporter, 9:

"At all events if Congress in the execution of its powers chooses to employ the intervention of a proper corporation, whether of the State or out of the State, we see no reason why it should not do so. There is nothing in the Constitution to prevent it from making contracts with *or conferring powers upon* State corporations for carrying out its own legitimate purposes."

And again:

"In our judgment, if Congress itself has the power to construct a bridge across a navigable stream for the furtherance of commerce among the States, it may authorize the same to be done by agents, whether individually or a corporation created by itself, *or a State corporation already existing and concerned in the enterprise.* The objection that Congress cannot confer powers on a State corporation is untenable."

The power being admitted, it is for the legislative wisdom to determine the means, subject only to the limitation that the means used must not be violative of constitutional requirements. To use the language of Judge Cooley:

"And while there are some objections to compelling a citizen to surrender his property to a corporation, whose corporators, in receiving it, are influenced by motives of private gain and emolument, so that to *them* the purpose of the appropriation is altogether private, yet conceding it to be settled that these facilities for travel and commerce are a public necessity, if the Legislature reflecting the public sentiment decide that this general benefit is better promoted by their construction through individuals or corporations than by the State itself, it would clearly be pressing a constitutional maxim to an absurd extreme if it was to be held that the public necessity should only be provided for in the way which is least consistent with the public interest."

Cooley's Constitutional Limitations, Sec. 537.

From the inception of railroad building in this country the right of eminent domain has been exercised in their behalf; not *by* them but *for* them, the power not being in them but in the State as one of the elements of its sovereignty. Now, the sovereignty of the general government is as supreme within its sphere as is that of the States within theirs, and the right of the general government to use the right of eminent domain for such purposes as are intrusted to it, either directly or through private agencies, is as free and untramelled as is that of the States. The power to authorize the construction of a railroad would be a barren one if it did not include the power to authorize every step necessary to be taken to make it effective. How full and ample are the powers of Congress in this respect is shown by the recent decision of this Court in California *vs.* Pacific Railroad Company, 127 U. S., 1. Mr. Justice Bradley, delivering the opinion of the Court, said:

"The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State is essential to the complete control and regulation of inter-State commerce. Without authority in Congress to establish and maintain such highways and bridges it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent, the Cumberland or National Road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject. Of course the authority of Congress over the Territories of the United States and its power to grant franchises exercisible therein are and ever have been undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in

the creation of the vast system of railroads connecting the East with the Pacific, traversing States as well as Territories, and employing the agency of State as well as Federal corporations."

This, then, the latest exposition by this Court of the power of Congress to provide for the construction of railroads from State to State, declares that Congress "has plenary power over the whole subject." The Act of Congress which the bill attacks is simply an exercise of this power, and is therefore entirely constitutional, unless it should appear that the lands of the Cherokees have some peculiar safeguard thrown around them which exempts them from the power the United States Government exercises in other portions of the country. This, indeed, is the theory of the bill: That by a series of treaties the United States has "recognized" the sovereignty of the Cherokee Nation, and is now estopped from asserting its own. How singularly erroneous this theory is will be discovered by a very brief examination of these treaties, and of the legislation and judicial decisions which have from time to time illustrated the relations of the Indians to the Government of the United States.

II.

The Cherokee Nation is not a sovereign State. Nor has the right of eminent domain of the United States over the Cherokee country been abridged or surrendered by treaty or otherwise.

The bill does not deny the general power of Congress to authorize the construction of railroads to be used as instrumentalities of commerce among the States, nor that the United States possesses the right of eminent domain as a

general proposition, but it asserts that in the Cherokee country the exclusive right of eminent domain is in the Cherokee Nation.

Inasmuch as the Indian Territory is a part of the Louisiana purchase it is certain that the United States *once* possessed the right of eminent domain and every other attribute of sovereignty over that country

By the treaty concluded between the United States and the French Republic, April 30th, 1803, the latter power ceded to the United States "forever and *in full sovereignty* the said territory and all its rights and appurtenances" (8 Stats. at Large, 200).

How and when did the United States lose its "sovereignty" over that portion of the purchase which now constitutes the Cherokee Country? It has not been erected into a State of the Union, so that no complication as between a State and the general government arises. If, therefore, the United States has lost in the Cherokee Country those great prerogative rights of sovereignty which it possesses elsewhere within its geographical limits, a most startling anomoly is presented. The sovereignty of a State of the Union and the sovereignty of the United States are each supreme within their spheres, but their spheres being distinct they can both exist as to the same territory without clashing. But the sovereignty asserted for the Cherokee Nation is exclusive and absolute. The allegations of the bill have no uncertain sound. They declare that the Cherokee Nation "is a sovereign State"; that it has "inherent rights of sovereignty," and that "the right of eminent domain as well as other rights of sovereignty in the said territory, the country of your complainant, remains *exclusively* vested in your complainant."

An analysis of the bill discloses three grounds on which the Cherokees rely for the relief sought:

First: Inherent rights of sovereignty.

Secondly: Recognition by treaties.

Thirdly: Patents in fee simple to their lands.

How unstable a basis these are for the superstructure erected upon them will appear by examining historically the relation of the Cherokees to the United States as written in the treaties mentioned in the bill. Judge Parker, of the Court below, in his very able opinion, has shown with great clearness the status of the Cherokees as a dependent people under the protection of the United States. Their rights are not less, but more, sacred from their dependent condition, and the assertion of sovereignty and independence, whether addressed to the judicial or the political branch of the government, is untimely and mischievous.

Treaty of Hopewell, Nov. 22d, 1785.

The first treaty mentioned in the bill, and the first in point of fact, is the treaty of Hopewell, concluded November 22d, 1785. This was before the adoption of the Constitution, and is interesting as showing how, even at that early date, the dominion of the United States was asserted by the government and acknowledged by the Cherokees. The very first article receives the Cherokees "into the favor and protection of the United States of America." Article 3 recites that the Indians "do acknowledge all the Cherokees to be under the protection of the United States of America, and of no other sovereign whosoever." It is difficult to see in this language either an assertion by the Cherokees or an acknowledgment by the United States of their independence and sovereignty. By Article 4, a "hunting ground" is allotted to the Cherokees "within the limits of the United States of America." By Article 9 it is provided that "the United States of America in Congress assembled shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper." It is needless to say, that as a recognition of the sovereignty or independence of the Cherokees the treaty of Hopewell is

plainly and unmistakably the reverse of what is claimed for it in the bill.

Revision of Indian Treaties, page 25.

THE TREATY OF HOLSTON, JULY 2D, 1791.

Again, the Cherokees place themselves under the protection of the United States, and also agree "not to hold any treaty with any foreign power, individual State or with individuals of any State." But the most interesting provision of the treaty, because it shows how little it is to be regarded as a recognition of sovereignty or independence in the Cherokees, is the 14th Article, which recites: "That the Cherokee Nation may be led to a greater degree of civilization, and to become herdsmen and cultivators, instead of remaining in a state of hunters, the United States will from time to time furnish gratuitously the said Nation with useful implements of husbandry." Teacher and pupil is the relation here; not independent high contracting powers.

Revision of Indian Treaties, p. 28.

TREATY OF PHILADELPHIA, JAN. 21ST, 1795.

This treaty declares the treaty of Holston to be in full force and binding upon the parties. It provides for the furnishing of goods in lieu of money, and by the 4th Article the Cherokee Nation stipulate to make an effort "to stop the practice of stealing horses."

Rev. of Indian Treaties, 31.

TREATY OF TELLICO, OCT. 2d, 1798.

This treaty declares the former treaties to be still in force and contains certain other provisions not connected with the subject of the present discussion.

Rev. of Indian Treaties, 32.

TREATY OF WASHINGTON, MARCH 23d, 1807.

This treaty is a purchase by the United States and a sale and cession by the Cherokees of certain lands described therein.

Rev. of Indian Treaties, 39.

TREATY OF CHEROKEE AGENCY, DEC. 26th, 1817.

This treaty, mentioned in the bill as a recognition of the "inherent sovereignty" of the Cherokees is the first one I find which alludes to a removal to the west of the Mississippi. It has a curious recital of a speech which the President of the United States had made to a delegation of Cherokees who visited Washington in 1808. They had gone there to explain to the President the unhappy differences that existed between those Cherokees who desired to engage in agriculture and civilized life, and those who preferred to remain hunters. The President, it is recited, called them "my children" and assured them that the United States were friendly to both parties. To those who wished to go west, he promised aid to their removal and added: "And when established in their new settlements we shall still consider them as our children, give them the benefit of exchanging their peltries for what they will want at our factories, and always hold them firmly by the hand."

Rev. of Indian Treaties, 45.

TREATY OF WASHINGTON, MARCH 10TH, 1819.

This treaty sheds no light on questions of "sovereignty," but relates to sales and cessions of lands.

Rev. of Indian Treaties, 501.

TREATY OF WASHINGTON, MAY 28TH, 1828.

This treaty is one of a series looking to the removal of the Cherokees from their old homes to the west. It

recites the anxious desire of the United States to secure to the Cherokees "a *permanent* home," one which shall "under the most solemn guarantee of the United States be and remain theirs forever—a home, that shall never in future time be embarrassed by having extended around it the lines or placed over it the jurisdiction of a Territory or State." The Court will observe that it was a home, and not an Empire which was desired, and that the Cherokees objected to being under the jurisdiction of a Territory or State, but not of the United States.

Rev. of Indian Treaties, page 56.

THE TREATY OF FORT GIBSON, FEB. 14TH, 1833.

This treaty sheds no light on the question of sovereignty.

Rev. of Indian Treaties, 61.

TREATY OF NEW ECHOTA, DEC. 31ST, 1835.

This treaty is an important one in Cherokee history. It recites the desire of the Cherokees to secure a home "without the territorial limits of State Sovereignties where they can established and enjoy a government of their choice, and perpetuate such a state of society as may be consonant with their views, habits and condition, and may tend to their individual comfort and advancement in civilization." This preamble shows the aversion of the Cherokees to being within the jurisdiction of a State of the Union and it shows they had reached a period when they were ready to take upon themselves the responsibilities of a local but strictly subordinate self government. By Art. 5 the United States agreed to "secure to the Cherokee Nation the right by their National Councils to make and carry into effect all such laws as they may deem necessary for their government and protection of the persons and property within their own country belonging to their own

people or such persons as have connected themselves with them. *Provided always*, that they shall not be inconsistent with the Constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians."

Instead of "inherent sovereignty" the Cherokees here receive from the United States a grant of authority to make laws. And the laws must not be inconsistent with the Constitution of the United States nor of the Indian intercourse laws. How far this is from an independent and sovereign condition is plain at a glance. In addition to these provisions Art. 17 provides that "All stipulations in former treaties which have not been superseded or annulled by this shall continue in full force and virtue." The former treaties, placing them under the protection of the United States, had not been annulled, and this treaty perpetuates them.

Rev. of Indian Treaties, page 65.

TREATY OF WASHINGTON, AUG. 17, 1846.

The principal object of this treaty was to heal the differences that existed between the Cherokees who had removed to their new home in the West and those that remained behind. It provided for a patent to be issued to the Cherokees in accordance with former treaty provisions and the act of May 28th, 1830. It provides that all difficulties and differences "heretofore existing between the several parties of the Cherokee nation are hereby settled and adjusted and shall as far as possible be forever buried in oblivion." Pardon and amnesty were granted offenders, and it was provided (Article 2) that "full authority shall be given by law to all or any portion of the Cherokee people peaceably to assemble and petition their own government or the government of the United States for the redress of grievances and to secure their rights." Here again is a recognition, not of the sovereignty, but of the dependence of the Cherokee people, for it is to the United States

that they are to have the right to petition for a redress of greivances.

Rev. of Indian Treaties, 79.

Treaty of Washington, July 10, 1866.

This is the last of the Cherokee treaties. It is one of the most important in the whole series and it is the one which most completely exposes the absurdity of the averment in the bill of sovereign powers in the Cherokee nation.

It is almost impossible to point out the different provisions of this treaty which recognize the dominion and controlling power of the United States over the Cherokees. They are found substantially in every article.

By the 5th Article, local police regulations are to be suspended by the President if in his opinion they bear oppressively on any citizen of the Nation.

By the 6th Article, representation in the National Council is provided for; and if any law of the National Council, either in its provisions or the manner of its enforcement, operate unjustly or injuriously in said district, the President is authorized to correct such evil.

By Article 7, a United States Court is provided for.

By Article 12, a general council of all the tribes in the Indian Territory is provided for, with jurisdiction over the relations and intercourse of the tribes with each other, but laws passed by the General Council may be suspended by the President of the United States. It is provided also that "no law shall be enacted inconsistent with the Constitution of the United States or laws of Congress, or existing treaty stipulations with the United States."

The General Council is to be presided over by such person as may be designated by the Secretary of the Interior. The Secretary of the council is to be paid out of the treasury of the United States, an annual salary of five hundred dollars. The members of the Council are to be paid by the United States.

These and many similar provisions show the relation of the Cherokees to the United States to be quite different from that set forth in the bill.

Rev. of Indian Treaties, 85.

Having examined the various treaties, beginning with 1785 and ending with 1866, it is respectively submitted that the fabric of sovereignty constructed by the bill falls, or, more correctly speaking, is found never to have existed.

III.

The sovereignty of the Cherokee people is distinctly negatived by the legislation of Congress.

For nearly a century Congress has legislated in relation to Indians and the Indian country. A bureau of one of the great departments of the government is exclusively devoted to Indian affairs. The Cherokees and many other tribes were removed west of the Mississippi under the provisions of an act of Congress approved May 28th, 1830, and this Act is recited in the Treaty of Washington of August 17th, 1846.

The Revised Statutes of the United States (Sec. 2114) provide:

"The President is authorized to exercise general superintendence and care over any tribe or nation which was removed upon an exchange of territory under authority of the act of May twenty-eighth, eighteen hundred and thirty, to provide for an exchange of lands with the Indians residing in any of the states or territories and for their removal west of the Mississippi, and to cause such tribe or nation to be protected at their new residence against all interruptions or disturbance from any other tribe or nation of Indians, or from any other person or persons whatever."

The government appoints an agent for the different tribes and nations—including the Cherokees—who exercises general care and superintendence over their affairs. In short, the control and protection of the Indians, including the Cherokees, constitutes one of the most important subjects of Federal legislation. Page after page of the Revised Statutes relate to the government and protection of Indians, and of the Indian country. In all this legislation there is not a line that does not substantially assert the power and authority of the United States over the Indians and their dependence upon and subordination to the United States.

IV.

The status of the Cherokees as a people, subject to and dependent upon the United States, is shown by numerous decisions of this Court.

In the familiar case of the Cherokee Nation *vs.* the State of Georgia, 5 Peters, 1, Chief Justice MARSHALL and Justices JOHNSON and BALDWIN delivered very elaborate opinions on the relations of the Cherokees to the United States. In that case, as in this, the bill asserted the sovereignty and independence of the Cherokee Nation, and in addition it was claimed that they were a "Foreign State" within the meaning of the second section of the third article of the Constitution. But the Court declared them to be "in a state of pupilage."

"They look to our government for protection," said Chief Justice Marshall, "rely upon its kindness and its power, appeal to it for relief to their wants, and address the President as their Great Father. They and their country

are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility.

Mr. Justice JOHNSON, in his opinion, inquires "At what time did this people acquire the character of a State?" And answers "Certainly not by the treaty of Hopewell, for every provision of that treaty operates to strip it of its sovereign attributes."

And again he says:

"The right of sovereignty was expressly assumed by Great Britain over their country at the first taking possession of it, and has never since been recognized as in them otherwise than as dependent upon the will of a superior."

Another instructive case is United States *vs.* Rogers, 4 Howard, 567, in which Chief-Justice TANEY said:

"The country in which the crime is charged to have been committed is a part of the territory of the United States and not within the limits of any particular State. It is true that it is occupied by the tribe of Cherokee Indians. But it has been assigned to them by the United States as a place of domicile for the tribe, and they hold and occupy it with the assent of the United States and under their authority."

The recent case of *United States* vs. *Kagama*, 118 U. S., 375, contains a most interesting and able exposition of the political status of Indian tribes within the United States. The test by which the question of authority is to be determined is a simple one. Mr. Justice Miller applies it in the following language:

"But these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States or of the States of the Union. There exists within the broad domain of sovereignty but these two."

How fatal this language is to the theory of the bill is too plain to need enlargement. National and State—these two are the only sovereignties known to our political system; while the bill insists that there are three: National, State and Cherokee. The opinion of Mr. Justice Miller in the case of Kagama closes with the following emphatic sentences:

"The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection as well as to the safety of those among whom they dwell. It must exist in that Government because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it alone can enforce its laws on all the tribes."

The opinion seems to be entertained by complainant that there is something in the mere fact that the Government makes, or formerly made, treaties with the Indian tribes that elevates them into a state of independence and sovereignty. But as we have seen, these very treaties are distinctly based upon another idea, namely, the dependence and subordination of the Indians. Nor does the fact that the Cherokees maintain a local government of their own, and have established some of the institutions of a settled political system, make them a sovereign State; much less does it divest the United States of the sovereignty which we have seen it once possessed. Cities, counties and other subdivisions of a State exercise certain functions of government, enact ordinances and punish their violation, and carry on the various affairs which are entrusted to them. But this gives them none of the attributes of sovereignty, for all these powers are derivative, and subordinate to the State. A Territory, through its government, exercises extensive powers, enacts laws, punishes crimes and protects its inhabitants in their legal rights. But this is not sovereignty, for the Territorial government is but the mere instrument of a superior sovereign—the United States.

United States vs. *Kagama*, *supra*.

The power of Congress over the Indian country, its people and its territory is full and well-nigh absolute. It is unfettered by treaty stipulations if for reasons of policy it chooses to disregard them.

The Cherokee Tobacco, 11 Wallace, 616.

THE CHEROKEE PATENT.

The bill avers that the United States has issued to the Cherokees a patent in fee simple for their lands, and that, by reason of the treaties mentioned in the bill and the patent, the right of eminent domain does not remain in the United States, but remains solely in the Cherokee Nation.

It seems hardly necessary to say that lands held by a fee simple title are no more exempt from a taking under the right of eminent domain than lands held by any other title.

The bill confuses in a curious way the rights which pertain to the Cherokees as a political organization and those which are connected merely with interest in property. When the United States grants land, either by treaty or otherwise, and whether the grant is evidenced by patent or otherwise, there always remains in the United States the right to retake it under the sovereign right of eminent domain, and appropriate it to public uses. The patent does not divest the Government of its political functions, its dominion and control over the territory, but merely passes title to the soil. It would probably not be difficult to show, if it were necessary, that the Cherokees' title to the outlet or strip through which the defendants' road runs is not a fee simple, but an easement, or, as the treaty describes it, an "outlet"—a "perpetual outlet west, and a free and unmolested use of all the country west of the western boundary of said seven millions of acres, as far west as the *sovereignty* of the United States and their right of soil extend."

Treaty of Fort Gibson, Rev. of Ind. Treaties, 61; and Treaty of New Echola, Rev. of Ind. Treaties, 65.

Here, in the very language which is the foundation of the Cherokees' rights in the land in question, the language chosen by the parties to describe the land, is the assertion of sovereignty in the United States. Now, whatever title was passed to the Cherokees under this provision or by the patent which followed it, no right of sovereignty was stipulated for or granted. That was in the United States and remains there to day.

The Government Cannot Abdicate nor Barter away Its Inherent Powers.

No treaty with the Cherokees and no legislation by Congress can be pointed out which even attempts to bargain away the sovereignty of the United States. But any attempt to do so would fail. Neither the treaty-making power nor the law-making power possesses any authority to dispose of the national sovereignty, or of any of the functions and attributes which under the Constitution belong to the Government. Doubtless by treaty a cession of territory and sovereignty might be made to a foreign power, but the Government cannot abdicate its powers over any portion of the United States which at the same time remains within the United States. The Constitution is above the treaty-making power, and above the legislative power, and what the Constitution has given, these inferior powers can not take away.

"It would seem, therefore," says Judge Cooley, "to be the prevailing opinion and one based upon sound reason that the State cannot barter away or in any manner abridge or weaken any of those essential powers *which are inherent in all governments*, and the existence of which in full vigor is important to the well-being of organized society"

Constitutional Limitations, 343.

"When the existence of a particular power in the Government is recognized on the ground of necessity no delega-

tion of the legislative power by the people can be held to vest authority in the department which holds it in trust to bargain away such power or to so tie up the hands of the Government as to preclude its repeated exercise as often and under such circumstances as the needs of the Government may require."

Constitutional Limitations, 649.

The power to regulate commerce among the States gives to Congress, as was said by Mr. Justice BRADLEY in California *vs.* Pacific Railroad Co., *supra*, "plenary power over the whole subject." The railway provided for by the act out of which this suit arises is, and was designed to be, an inter-State railway; an instrument of that kind of commerce which Congress is authorized to regulate. Section 4 declares that "Congress expressly reserves the right to fix and regulate at all times the cost of such transportation by said railway or said company whenever such transportation shall extend from one State into another or shall extend into more than one State." It is a post road; and by the act it is provided "that said railway company shall carry the mail at such prices as Congress may by law provide; and until such rate is fixed by law the Postmaster-General may fix the rate of compensation."

Here is the exercise of powers conferred upon Congress by the Constitution; powers which have not been and cannot be bartered away. If, by treaty, or in any other manner, the Cherokees have managed to close up their country against the power of Congress over these subjects it is plain that they have succeeded not only in exempting themselves from them, but have deprived the whole people of the United States of the benefits which were intended to ensue from the exercise of such powers. It is not simply the Cherokees who are interested in post roads in their country, but every citizen of the United States; and if the power of Congress over commerce among the States has been destroyed in the Cherokee country, the interests and well-being of the whole body of the people have been dis

regarded. The powers conferred upon Congress are to be exercised for the benefit of all, and all have an interest in their being exercised, whenever the public welfare demands it.

Commerce with the Indians.

Not only does the act of Congress authorizing this railroad to be built fall within the power of regulating commerce and establishing post roads, but it is clearly a regulation of commerce "with the Indian tribes" and therefore authorized by the Constitution; for it cannot be said that a railroad is a proper instrumentality of commerce among the States, but not a proper one with the Indian tribes. The act contemplates the use of the railroad by the Indians and provides that "said railroad company shall not charge the inhabitants of said Territory a greater rate of freight than the rate authorized by the laws of the State of Kansas for services or transportation of the same kind; provided that passenger rates on said railway shall not exceed three cents per mile."

The act granting this right of way is therefore plainly sustained by the authority to regulate commerce among the States; by the authority to establish post roads; and by the authority to regulate commerce with the Indian tribes. These powers are conferred by the Constitution, and cannot be taken away by treaty nor in any other manner, except by an amendment to the Constitution itself.

Ownership in Common.

The lands, the taking of which are complained of, are held by the Cherokees in common as a part of the outlet west, and it may be urged that this fact cuts some figure in determining their legal rights. But clearly the right of eminent domain, which exists in the Government of the United States, does not depend upon the question whether the

lands sought to be taken are held in common or in severalty. It is not and cannot be claimed that they are held for public or Cherokee National purposes, or that they have been set aside by the Cherokees for any use connected with the operation of their tribal government. On the contrary the bill declares that the lands are leased for grazing purposes. Whatever may be the political status of the Cherokees they are as to these lands mere proprietors; and if their political dignity and authority were much higher than they are, the lands would still be subject to be taken.

"It is not questioned that land within a State purchased by the United States as a mere proprietor, and not reserved or appropriated to any special purposes, may be liable to condemnation for streets or highways, like the land of other proprietors, under the rights of eminent domain."

United States *vs.* Chicago, 7 Howard, 185.

THE EFFECT OF PRIOR TREATIES IN LIMITING THE POWER OF CONGRESS TO PASS THIS STATUTE.

The sovereignty which is claimed for the Cherokees by the bill is declared to be based upon recognition by the United States. While it speaks of "inherent sovereignty," the gist of the bill is in the averment "nor did the right of eminent domain over such territory remain in the United States, but that *by its treaties* and patents aforesaid remained solely in your complainant the Cherokee Nation" (Bill, 7th Section, Record, page 2).

Now, the settled doctrine of this Court is that an Act of Congress supersedes a prior treaty which is in conflict with it. (The Cherokee Tobacco, 11 Wallace, 616). Conceding, for the sake of the argument, that the United States by treaty has abdicated its right of eminent domain over the Cherokee country, what is the result? By the act granting the right of way it has *reasserted* its right; it has in the most positive manner declared that it *will* exercise the right of eminent domain. The language is plain, clear and explicit; the intention of Congress open and unmistak-

able. The result is that treaty stipulations, if any existed, give way. The judicial follows the political department of the Government. In the Tobacco Case, *supra*, a former treaty admittedly guaranteed every Cherokee Indian freedom from taxation on the products of his farm, and a subsequent act of Congress declared that it should be taxed. In this case it is claimed, but not admitted, that certain treaties guaranteed to the Cherokees that their lands should not be subject to the right of eminent domain, and a subsequent act of Congress declares that it shall be. It requires no comment to show that the power of Congress is as ample in the one case as the other.

The treaty guaranty of exemption from taxation had to give way to an act of Congress in the Cherokee Tobacco Case, and a treaty exemption from the right of eminent domain (if any such exemption existed) would have to give way in this.

THE INDIAN COUNTRY NOW GOVERNED BY ACT OF CONGRESS AND NOT BY TREATY.

The Act of March 3d, 1871, forbids the acknowledgment or recognition of any Indian tribe or nation, as having sufficent independence to make contracts by treaty (Revised Stats., Sec. 2079).

Mr. Justice MILLER speaks of this act as follows:

"But after an experience of a hundred years of the treaty-making system of government, Congress has determined upon a new departure—to govern them by Acts of Congress" (U. S. *vs.* Kagama, *supra*).

There is another tribe or nation in the Indian Territory, the Choctaws, which are said to possess, and certainly claim to have reached, as high a state of civilization, independence and sovereignty as the Cherokees, and this Court decided in the case of the Choctaw Nation *vs.* The United States, 119 U. S., 27, that they were subject to Government under Section 2079 of the Revised Statutes,

being the Act of March 3d, 1871, above mentioned. Mr. Justice MATTHEWS, delivering the opinion of the Court, said:

"The United States is a sovereign nation, not suable in any court except by its own consent, and upon such terms and conditions as may accompany that consent, and is not subject to any municipal law. Its Government is limited only by its own Constitution, and the nation is subject to no law but the law of nations. On the other hand, the Choctaw Nation falls within the description, in the terms of our Constitution, not of an independent State or sovereign nation, but of an Indian tribe. As such it stands in a peculiar relation to the United States. It was capable under the terms of the Constitution of entering into treaty relations with the Government of the United States, although from the nature of the case, subject to the power and authority of the Laws of the United States when Congress should choose, as it did determine in the Act of March 3, 1871, embodied in Section 2079 of the Revised Statutes, *to exert its legislative power.*"

Now, that Congress possesses the constitutional right to govern the Indians cannot be questioned. It has exercised this right in innumerable cases. It has even gone so far as to enact punishment for a crime committed by one Indian upon another, on an Indian reservation within a State, and in a Territory whether on a reservation or not. These laws which establish a criminal code for Indians have been sustained by this Court. They have been sustained not under the clause for regulating commerce with the Indian tribes, but under the broad, general, comprehensive ground of sovereignty in the United States. The existence of sovereignty in the United States and its non-existence in the Indian tribes are both so thoroughly settled by the decisions of this Court, are so familiar in all our history, and so necessary to the maintenance of proper relations with the Indians that the assertions in the bill are little less than amazing.

The "sovereignty" claimed by the Cherokee Indians is higher than that which States of the Union possess; higher than that which the United States possess. But the law is

thoroughly settled that the United States now possesses every power necessary for the enjoyment of the enumerated powers of the constitution. Everything yields to the imperious necessity of the national welfare.

"The argument based upon the doctrine that the States have the eminent domain or highest dominion in the lands comprised within their limits, and that the United States have no dominion in such lands, cannot avail to frustrate the supremacy given by the constitution to the Government of the United States in all matters within the scope of its sovereignty. This is not a matter of words but of things. If it is necessary that the United States government should have an eminent domain still higher than that of the State in order that it may fully carry out the objects and purposes of the Constitution, *then it has it.* Whatever may be the necessities or conclusions of theoretical law as to eminent domain or anything else, it must be received as a postulate of the Constitution that the Government of the United States is invested with full and complete power to execute and carry out its purposes. And as one of these purposes is the regulation of commerce among the several States, and as that involves the needs and ways of intercommunication, it follows that Congress may provide for these necessities whether the States co-operate and concur therein or not."

Mr. Justice Bradley in Stockton *vs.* Baltimore and N. Y. Ry. Co., *supra.*

It seems almost inconceivable that it should be asserted for the Cherokees that their sovereignty is of a higher character than that of a State of the Union, and that Congress has lost, as to them, the power which it may exercise everywhere else. On the contrary, I respectfully submit they are subject in all respects to the Government of the United States; that they have no powers which can properly be called sovereign; that their right to a certain modified local self-government, is one which they exercise under the protection and supervision of the United States, and that within their territory, the Congress may freely exercise all the powers which the Constitution has conferred upon it.

V.

Not only is there no equity in the bill, but it must fail for non-conformity to the practice of Courts of Chancery.

THE INCONSISTENCY OF THE BILL.

The bill is a curiosity. The Cherokee Nation can only bring this suit by the authority of the very Act of Congress which it seeks to destroy as beyond the Constitutional power of Congress. The right of the Cherokee Nation to sue in the Court below is merely ancillary to the right which the railway company has to build its road. The one is dependent upon the other, for it goes without saying that Congress would not have conferred the one right if it had not first conferred the other. Indeed if Congress had not first conferred the right to build the road there would have been nothing about which to sue. The rule is a familiar one that when a portion of an act of legislation falls by reason of unconstitutionality, the remaining portion will be upheld only when it remains complete in itself, and capable of being executed in accordance with the apparent legislative intent wholly independent of that which was rejected.

Cooley's Constitutional Limitations, 212.
Virginia Coupon Cases, 114 U. S., 304.

Congress evidently did not pass the Act for the purpose of giving the Cherokees a general right to bring suits or to change the doctrine laid down in Cherokee Nation *vs.* Georgia. The contention of the Cherokees is therefore only this, that the Act of Congress is void as to the railway company, but valid as to them; void as to its main purpose and object, but valid as to a mere ancillary and dependent feature. This, we submit, cannot be so. They cannot

be permitted to point to the act as their authority to sue in the Court below but repudiate it as to everything else.

But it may be urged that if they cannot do this they are without remedy. To this suggestion it is only necessary to say that it does not and cannot overthrow the well-settled rule above mentioned. In the case of Cherokee Nation *vs.* Georgia, the fact that they could not sue left them without a remedy, so far as the Courts of the United States were concerned, but this Court did not consider that it could therefore take jurisdiction of the case.

The true construction undoubtedly is that the Act of Congress gave the Court below jurisdiction of controversies between the railway company and the tribe. But what controversies? The language is: "Over all controversies arising between said Southern Kansas Railway Company and the nations and tribes through whose territory *said railway shall be constructed.*" Evidently this means controversies growing out of the operation of the road; for the language is "shall be constructed" and not "contemplated" or "proposed." The right of appeal from the award of damages for right of way is given in another section. I say, therefore, that there is nothing in the act which opens the Federal Courts to a suit brought to have the act itself declared void.

The Prayer for Damages.

The bill alleges (Section 12, Record, page 3) that on the 21st day of January, 1887, the complainant appealed from the award of the referees and from all proceedings had and taken under said act. In Section 13 (Record, page 3) it is alleged that the damages awarded are inadequate and insufficient. And in the prayer (Record, page 4) the Court, in case it should decline to grant an injunction, is asked to award full, just and adequate compensation for the lands taken.

The bill also declares that while taking this appeal the

Cherokees saved and reserved all objection, protest and dissent and in no manner conceded the right of the railway company to appropriate the lands (Record, page 3).

I venture the suggestion that an Act of Congress has seldom had so many different meanings put upon it by the same party. The Statute gives an appeal, but the scope of the appeal is such only as the Statute points out, namely, "the finding of the referees." Now, the finding of the referees is only upon the question of damages, and the appeal goes only to that question. The appeal and the insistence that nothing shall be waived thereby are entirely incompatible.

1. The proceeding which the Statute provides in case of dissatisfaction with the award while it is by a petition *de novo* is an appeal and is so called in the Statute. Now, an appeal from an award of damages under an Act is an admission of the validity of the Act. Inserting protestations in an appeal that nothing is intended to be waived can have one of two only possible effects; it must either ruin it as an appeal, or the protestations must be disregarded. They cannot both stand.

This familiar doctrine is so clearly stated by the Supreme Court of Massachusetts, that I quote, at some lenghth, the opinion by Ames, J., in Pinkham *vs.* Chelmsford, 109 Mass., 229.

"In the second of these cases the demandant denies, and puts in issue, the lawfulness and validity of the proceedings of the town. That is to say, he denies that his land has been taken and appropriated by the town. He insists that it continues to belong to him exactly as if no such proceedings had ever taken place; and that the attempt of the town to place a school house upon the land is a mere disseizen and trespass. * * * But, as has already been intimated, it appears to us that the act of appealing to a jury to revise the doings of the Selectmen in the selection of the lot, and in the award of damages, is a waiver of all objection to the preliminary proceedings of the town, on the ground of any supposed irregularity. It is true that the demandant insists

that no such waiver was intended on his part, and professes himself ready to abandon all his proceedings before the Sheriff's jury, if the Court shall be of opinion that he is entitled to prevail in the present action. But we think he can derive no advantage from any such conditional abandonment. The law gives him no right to resort to two conflicting and incompatible modes of seeking redress, with the intention of placing his final reliance upon that one of the two which shall ultimately be sanctioned by the Court. He must elect one or the other of the two remedies, but he cannot rely upon both at the same time. It is a sufficient answer to all his objections to the proceedings of the town as void and of no effect, that he is at this moment in Court, claiming damages of the town for land taken by virtue of these very proceedings, and that the verdict of the jury in his favor has been sustained by the Court. If the action of the town had no legal effect, he has sustained no damage. His offer to abandon the proceedings before the Sheriff's jury, if the Court should hold him entitled to maintain this action, will not justify him in changing his ground and claiming that the land was never taken. He must either insist upon his objection to the doings of the town, or waive it unconditionally and without waiting for a decision of the Court as to the weight of that objection."

The logic of the situation is inexorable. A party cannot claim damage for a condemnation, and insist that there has been no condemnation at the same time. The two positions are destructive of each other, and if, as held in the case last cited, they can not be taken in separate suits, how much less can they be taken in one and the same.

2. But aside from the general doctrine, as to the effect of claiming an appeal and denying the validity of the condemnation at the same time, which is more properly a matter of law than of practice, another difficulty arises from the rules of practice in the Federal Courts.

Suits in equity and actions at law cannot be joined.

Hunt *vs.* Hollingsworth, 100 U. S., 100.

By statute, the forms and modes of proceeding on the equity side of the Federal Courts are required to be

according to the principles, rules and usages of courts of equity.

R. S., 913.

Thompson *vs.* Railroad Companies, 6 Wallace, 134.

Bennett *vs.* Butterworth, 11 Howard, 674.

An appeal from an award of damages is purely a proceeding at law; a proceeding looking to a new award by a jury. Plainly, therefore, it is widely different from a suit in equity and has no place in it.

3. Now if the complainant has appealed at all, it is important to ascertain when it appealed and what has become of the appeal. The act requires that the appeal be taken "within ninety days after the making of the award and notice of the same" (Sec. 4 of the Act).

The bill alleges that the appeal was taken on the 21st day of January, 1887, and that on that day complainant requested the Secretary of the Interior to transmit a transcript of the said award and of all proceedings under said act of July 4th, 1884, to the Court below (Sec. 11 of the Bill, Record, page 3). Now the bill in equity was filed January 26th, 1887, so that the attempt of the pleader is to show that an appeal was first taken, and afterward a bill in equity filed. The record does not disclose whether any steps have been taken to prosecute the appeal as a separate and independent proceeding. It seems to have been abandoned or left to slumber while the suit in equity has been prosecuted. It appears to be the theory of the complainant, that notwithstanding it had appealed six days before the filing of the bill, it could ignore its appeal and go forward with a suit in equity which should litigate all the questions, both legal and equitable, that grow out of the situation. This, as already shown, cannot be allowed; and the attempt to settle the question of damages by a suit in equity necessarily fails. How the complainant

expects to have its bill in equity treated as a petition in appeal, while at the same time alleging that it had appealed as required by the act six days before the filing of the bill, is not easily perceived.

The position of the complaint, therefore, is this: First, it appealed on the 21st of January, 1887; second, it filed a bill in equity on the 26th of January, 1887, in which it attempts to merge its appeal. A more singular disregard of the rules of law and of practice governing such cases can hardly be imagined.

4. The complainant seems to have endeavored to frame a bill with a "double aspect" which is permissible in some instances in equity; but the two aspects must both be equitable and the alternative case must be the foundation for precisely the same relief.

Shields *vs.* Barrow, 17 Howard, 143.

5. Nor is it known to the practice on the equity side of the Court to allow a pleading which has failed as a bill in equity to stand as a petition or original pleading at law; otherwise the numerous decisions in which it has been held by this Court, that bills in equity must be dismissed because they show a complete remedy at law, would fail of having any reasonable basis to support them, and it would be competent in all such cases for the complainant to ask that he be permitted to stay in court and transform his pleadings into such as properly belong to a court of law. This is not the practice, but the bill is dismissed without prejudice to the right of the plaintiff to institute his action at law, if he so desires.

Buzard *vs.* Houston, 119 U. S., 347.

Such was the decree of the Court below in this case. The bill was dismissed without prejudice. (Record, page 41.)

6. Finally, it does not appear that either the appeal or the bill in equity which complainant wishes to have treated as an appeal, was filed within ninety days "after the making of the award and notice of the same." The case is not like that arising out of a statute of limitations, which must be pleaded by the defendant. In this case the enacting clause of the statute giving the right also limits the time in which it must be asserted. That the appeal be taken within ninety days is of the very essence of the right and must be affirmatively shown.

Chitty on Pleading, 372.

In the case of King *vs.* Stephenton, 2 East., 362, there was a suit for a statutory penalty. The Court said:

"The statute which limits the information before the Commissioner to three months after the offense, also requires notice to be given to the defendant within a week after the information made; which notice was as necessary to be averred here *as that the original information was within three months as stated.*"

To the same effect see

King *vs.* Pratton, 6 T. R., 559.
Spieres *vs.* Parker, 1 *Id.*, 141.
Teel *vs.* Fonda, 4 Johns., 307.
Berry *vs.* Stinson, 23 Me., 143.
Williams *vs.* Hingham, 4 Pick., 347.

7. The bill alleges that the Commissioner of Indian Affairs gave notice of the award on the 29th of October, 1886, but the act does not require the Commissioner to give notice but clearly contemplates that the notice should be given by the Referees. It does not even appear that the notice given by the Commissioner on the 29th of October, 1886, was the first or only notice, and obviously it does not follow because he gave notice on that day that it was the first or only notice received by the tribe, whether given by him or by any one else, equally authorized to give it. It is cer-

tainly not in the power of the Commissioner to extend the time allowed by the Act of Congress; if he could do that, then the Secretary of the Interior might give another notice, and later on the President of the United States a third one, by means of which the time contemplated by the Act of Congress could be indefinitely enlarged. It is, however, not the last notice that counts; it is the first. And whatever notice is pleaded it must be shown that it is such a notice as would fix the time when the three months would begin to run. The vague and general averment that on the 29th of October the acting Commissioner gave a notice is a mere evasion of that accuracy which is required in pleading upon a statute.

I submit, therefore, that the decree of the Court below was correct, upon the various grounds herein discussed, and so much more clearly and forcibly stated by Judge Parker in his opinion embodied in the record.

A. J. Britton
A. B. Browne

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Office Supreme Court U. S.
FILED.
MAR 10 1890
JAMES H. McKENNEY.
CLERK.

IN THE

Supreme Court of the United States.

THE CHEROKEE NATION,
APPELLANT,
vs.
THE SOUTHERN KANSAS RAILWAY CO.

No. 664.

Appeal from the District Court of the United States for the Western District of Arkansas.

Reply to Brief of Appellant.

GEO. R. PECK,
A. T. BRITTON,
A. B. BROWNE,
Counsel for Appellee.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1890.

IN THE

Supreme Court of the United States.

THE CHEROKEE NATION, APPELLANT,

v.

THE SOUTHERN KANSAS RAILWAY COMPANY.

REPLY TO BRIEF OF APPELLANT.

Since the filing of our brief in this case we have been favored with a copy of the complainant's brief. We only wish to take the time of the Court with a few suggestions which will, we think, point out the radical fallacy upon which complainant's argument is based. This fallacy consists, first, of an erroneous conception of the nature of sovereignty; and, secondly, of an erroneous conception of the nature of vested rights.

I.

Our system of government knows but two depositories of sovereignty; namely, the National Government and the State Governments. A portion of the sovereignty of the people has been gathered up and deposited in these two reservoirs of power. All other governments in this country

are subordinate to these, and derive their powers from them. Under the National authority we have organized Territories, which have no original powers, no sovereignty, no governmental functions, except such as the nation vests in them for its own purposes. Under the State Governments are many subordinate agencies—such as counties, cities, and towns—with such powers as the State in its pleasure sees fit to give them. They are mere aids—mere auxiliaries—through which the State exercises its functions. There is no power—absolutely none—in this country which is not lodged either in the General Government or the States and the people. The courts are not permitted to look elsewhere. The language of the tenth amendment to the Constitution is explicit :

"The powers not delegated to the United States by the "Constitution, nor prohibited by it to the States are re- "served to the States respectively or to the people."

Where, then, in this country is power to be found ? The Constitution itself has said : It must be in the United States, the States, or latent and undelegated in the people.

II.

As to vested rights. The learned counsel for complainant argue that the Cherokee Nation, by treaties with the United States, have secured certain rights, which have become vested, and cannot be taken away. And they seem to contend that these vested rights are first such as pertain to their political status, and, secondly, such as pertain to their ownership of land.

1. There is no such thing as a vested right in a grant of political power. If by treaty or otherwise the United States has granted, guaranteed, or secured to the Cherokees

the right to carry on a local government, or the right to exercise certain political powers, that right can be taken away. It can be taken away because it was conferred simply as an instrument to be used for the purpose of carrying out the policy of the Government in respect to the Indians. They are, as to their local affairs, like municipal corporations, "mere instrumentalities of the State for the more convenient administration of localgovernment." Of them may be said what was said of municipal corporations by Mr. Justice Field in Merriwether *v.* Garrett, 102 U. S., 511:

> "Their powers are such as the Legislature may confer, "and these may be enlarged, abridged, or entirely with- "drawn at its pleasure. There is no contract between the "State and the public that the charter of a city shall not be "be at all times subject to legislative control. All persons "who deal with such bodies are conclusively presumed to "act upon knowledge of the power of the legislature. "There is no such thing as a vested right held by any indi- "vidual in the grant of legislative power to them."

The Cherokee country is a part of the Louisiana purchase. By the acquisition of that region the United States succeeded to all the powers of government over it. Now, if it has seen fit to made the Cherokee Nation an instrumentality "for the more convenient administration of local government," shall it be said that the Cherokees have secured a vested right to *be* that instrumentality? That they have become not only an instrumentality, but the sole and unlimited source of power? When Congress, after giving the people of the District of Columbia a local government modelled on that of the Territories, with a governor and legislature, and afterwards took it away, were the vested rights of the people of the District violated? We think not; but they most certainly were if the contention of the learned counsel for complainant is correct.

That the Cherokees are in a certain sense a political organization—that they are recognized as such by the United States is undoubtedly true. But what kind of a political organization? A strictly subordinate one. Inherent sovereignty dwells only in the States and the United States. In National Bank *v.* Yankton (101 U. S., 133). this Court, by Mr. Chief-Justice Waite, used this language:

"All territory within the jurisdiction of the United States "not included in any State must necessarily be governed by "or under the authority of Congress. The Territories are "but political subdivisions of the outlying dominion of the "United States. Their relation to the General Government "is much the same as that which counties bear to the re- "spective States, and Congress may legislate for them as a "State does for its municipal organizations. The organic "law of a Territory takes the place of a constitution as the "fundamental law of the local government. It is obliga- "tory on and binds the Territorial authorities; but Con- "gress is supreme, and for the purposes of this department "of its governmental authority has all the powers of the "people of the United States, except such as has been ex- "pressly or by implication reserved in the prohibitions of "the Constitution.

"In the organic act of Dakota there was not an express "reservation of power in Congress to amend the acts of the "Territorial Legislature, nor was it necessary. Such a power "is an incident of sovereignty, and continues until granted "away. Congress may not only abrogate laws of the Ter- "ritorial Legislatures, but it may itself legislate directly for "the local government. It may make a void act of the "Territorial Legislature valid, and a valid act void. In "other words, it has full and complete legislative authority "over the people of the Territories and all the departments "of the Territorial governments. It may do for the Terri- "tories what the people under the Constitution of the "United States may do for the States."

It is for Congress to say in what manner and to what extent local government shall be organized in any of the Territories of the United States lying outside of the limits of a State. There is no *right* of local self-government anywhere except within a State of the Union; all that may be given beyond that is given as a matter of legislative discretion, and not as a matter of right. This doctrine is distinctly laid down in Murphy *v.* Ramsey (114 U. S., 44), thus:

"But in ordaining government for the Territories and the "people who inhabit them, all the discretion which belongs "to legislative power is vested in Congress; and that ex- "tends, beyond all controversy, to determining by law from "time to time the form of the local government in a par- "ticular Territory, and the qualifications of those who shall "administer it. It rests with Congress to say whether, in "a given case, any of the people, resident in the Territory, "shall participate in the election of its officers or the mak- "ing of its laws; and it may, therefore, take from them any "right of suffrage it may previously have conferred, or at "any time modify or abridge it, as it may deem expedient. "The right of local self-government, as known to our sys- "tem as a constitutional franchise belongs, under the Con- "stitution, to the States and to the people thereof, by whom "that Constitution was ordained, and to whom by its terms "all power not conferred by it upon the Government of the "United States was expressly reserved. The personal and "civil rights of the inhabitants of the Territories are secured "to them, as to other citizens, by the principles of consti- "tutional liberty which restrain all the agencies of govern- "ment, State and National; their political rights are fran- "chises which they hold as privileges in the legislative dis- "cretion of the Congress of the United States. This doctrine "was fully and forcibly declared by the Chief Justice de- "livering the opinion of the Court in National Bank *v.* "County of Yankton (101 U. S.) 129."

2. But it is urged that the "vested rights" of the Cherokees in their *land* has been violated by the act, and it is as-

serted that they have a patent in fee-simple for it. But what is the vested right that an owner has in his property? Simply the right that it shall not be taken "without just "compensation." This limitation upon the right of eminent domain has been observed with scrupulous care in the act. Every species of property is subject to this right, and all property is acquired and held with the implied condition that it may be so taken. The right of eminent domain does not impair the obligations of contract, for all contracts are made subject to it. Patents and deeds of conveyances guaranteeing title and possession forever do not and cannot exempt the property from it. In West Bridge Co. *v.* Dix (6 Howard, 532) this Court said:

"Now, it is undeniable that the investment of property "in one citizen by the Government, whether made for a "pecuniary consideration or founded on conditions of civil "or political duty, is a contract between the State or the Gov- "ernment acting as its agent and the grantee; and both "parties thereto are bound in good faith to fulfil it. But "into all contracts, whether made between States and in- "dividuals or between individuals only, there enter condi- "tions which arise not out of the literal terms of the con- "tract itself; they are superinduced by the pre-existing "and higher authority of the laws of nature, of nations, or "of the community to which the parties belong; they are "always presumed, and must be presumed, to be known and "recognized by all, are binding upon all, and need never, "therefore, be carried into express stipulation, for this could "add nothing to their force. Every contract is made in "subordination to them, and must yield to their control as "conditions inherent and paramount, wherever a necessity "for their execution shall occur. *Such a condition is the* "*right of eminent domain.*"

It appears therefore that neither the political rights nor the rights of property of the Cherokees have been violated.

III.

It is claimed by appellant's counsel that in cases of this kind compensation must precede appropriation.

To this contention it is only necessary to remark that in the absence of a constitutional provision requiring compensation to be first made, it is competent for the legislature to authorize an appropriation with proper provision for securing the compensation. The authorities sustaining this proposition are so numerous that we content ourselves with quoting from Pierce on the Law of Railroads, p. 163, where they are collated and embodied in the text as follows:

"TIME WHEN COMPENSATION MUST BE MADE.

"The *time* when the compensation must be made varies "according to the terms of the constitutional provision, and "the different constructions applied to it. If the actual "payment of the compensation were required to precede an "entry for construction, the entry would be delayed until "the amount when not agreed upon, had been finally de- "termined by legal proceedings; and such delay would "often result in serious detriment to public interests. Now, "although the prepayment may be necessary for absolute "security, it is not essential to the reasonable certainty of "compensation which the Constitution is presumed to have "had in view. The Legislature is to be allowed a measure "of discretion in providing means for giving effect to the "provision which will at the same time not interfere with "the general welfare. The provision, too, it should be noted, "does not undertake to secure the citizen against all injuries "to his property, but only against a *taking*—a term which "designates a final transfer of title to property, or its per- "manent subjection to an easement. Accordingly, if the "statute provides a mode of fixing the amount of the com- "pensation, which the owner can initiate, and gives him "the right to require security for its payment, when "finally ascertained, leaving him legal and equitable rem-

" edies for reclaiming possession in case it is not paid, his " constitutional right has been respected, although, in the " possible event of the insolvency of the corporation to " which the right of eminent domain has been delegated, " and of its sureties, he may suffer during the pendency of " proceedings from the interference with his property and " the construction of public works upon it. It has there- " fore been held that, in the absence of a distinct provision " in the Constitution requiring the prepayment of compen- " sation, such prepayment need not precede an entry for " the construction of a railroad if some existing law affords " an adequate remedy for obtaining it; and the provision is " complied with if in place of such prepayment a deposit of " a certain amount in Court, or a bond with sufficient " sureties—the amount and sufficiency to be determined by " some impartial tribunal or body—is required."

The only limitation in the Constitution of the United States is that private property shall not be taken for public use " without just compensation." There is absolutely nothing in this provision that requires it to be paid before entry or which prohibits a temporary occupation pending the final ascertainment of the damages. This Court in Kennedy *v.* Indianapolis (103 U. S., p. 599), construing a provision of the constitution of Indiana which provided " that no man's " particular services shall be demanded or property taken " or applied to public use without the consent of his repre- " sentatives, or without a just compensation being made " therefor," after citing and commenting upon various decisions of State courts, said:

" Not to multiply cases further, it seems to us that both " on principle and authority the rule is, under such a con- " stitution as that of Indiana, that the right to enter on and " use the property is complete as soon as the property is " actually appropriated under the authority of law for a " public use, but that the title does not pass from the owner

" without his consent until just compensation has been made " to him."

This record shows that the appellee has proceeded in strict conformity with the act of Congress, and the act itself is strictly within the principle above announced by this Court.

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